No. 94-325-CFX
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Title: Chandris, Inc., et al., Petitioners
v.
Antonios Latsis

Docketed:
August 22, 1994

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: McCreadie,David W.

Counsel for respondent: Rosenberg,Lewis

Entry	Date	Note	Proceedings and Orders
1	Aug 22 1994	G	Petition for writ of certiorari filed.
2	Sep 20 1994		Brief of respondent Antonios Latsis in opposition filed.
3	Sep 28 1994		DISTRIBUTED. October 14, 1994 (Page 2)
4	Oct 17 1994		Petition GRANTED.
			**********
5	Nov 18 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Second Circuit.
7	Nov 30 1994		Brief of petitioners Chandris, Inc., et al. filed.
8	Nov 30 1994		Joint appendix filed.
6	Dec 1 1994		Brief amici curiae of TECO Transport & Trade Corp, et al. filed.
9	Dec 1 1994		Brief amicus curiae of City of New York filed.
10	Dec 21 1994		SET FOR ARGUMENT TUESDAY, FEBRUARY 21, 1994. (3RD CASE).
11	Dec 21 1994		CIRCULATED.
13	Dec 30 1994	X	Brief of respondent Antonios Latsis filed.
14	Dec 30 1994	X	Brief amicus curiae of United Brotherhood of Carpenters and Joiners of America filed.
12	Jan 3 1995		Record filed.
		*	Original record proceedings United States District Court for the Southern District of New York.
15	Jan 3 1995	X	Brief amicus curiae of Association of Trial Lawyers of America filed.
16	Feb 2 1995	X	Reply brief of petitioners filed.
17	Feb 21 1995		ARGUED.

FILED

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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHAT EMPLOYMENT-RELATED CONNECTION TO A VESSEL IN NAVIGATION IS NECESSARY FOR A MARITIME WORKER TO QUALIFY AS A SEAMAN UNDER THE JONES ACT, 46 U.S.C. § 688?

INTERESTED PARTIES

The following persons and entities were parties below and have an interest in the outcome of this case:

Chandris, Inc.

Chandris S.A.

Fourth Transoceanic Shipping Co., Ltd.

Antonios Latsis

STATEMENT OF PARENT, SUBSIDIARY AND AFFILIATE CORPORATIONS

Petitioners, Chandris, Inc., Chandris S.A. and Fourth Transoceanic Shipping Co. Ltd., are affiliated with the following corporations:

Celebrity Cruises Inc.

Celebrity Cruise Services Ltd.

Celebrity Cruises (Management) Inc.

Celebrity Cruise Lines Inc.

Chandris (England) Ltd.

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CHANDRIS, INC., CHANDRIS, S.A. and
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v.

ANTONIOS LATSIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Second Circuit entered on March 24, 1994.

OPINIONS BELOW

The Order denying the Petition for Rehearing in the court of appeals (Appendix, A37) is unreported. The opinion of the court of appeals (Appendix, A1) is

reported at 20 F.3d 45. The judgment of the district court (Appendix, A34) is unreported.

JURISDICTION

Petitioners seek review of an opinion entered on March 24, 1994. The order denying the petition for rehearing of that opinion was entered on May 24, 1994. This petition for writ of certiorari is filed within ninety days of the entry of the May 24, 1994 order denying the petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article III, Section 2, Clause 1, of the United States Constitution, provides, in relevant part, that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

JONES ACT STATUTORY PROVISION

The Jones Act, 46 U.S.C. § 688, provides, in relevant part, "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . . "

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT PROVISION

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), provides, in relevant part, " 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel . . . . "

STATEMENT OF THE CASE

District Court Jurisdiction

Jurisdiction of the United States District Court, Southern District of New York, was based upon 28 U.S.C. § 1331 and 46 U.S.C. § 688.

Procedural History

In October 1991, Antonios Latsis ("Mr. Latsis") commenced a lawsuit pursuant to the Jones Act, 46 U.S.C. § 688, against Chandris, Inc. Mr. Latsis filed his action in connection with personal injuries allegedly suffered by Mr. Latsis while employed as a seaman on board a vessel owned by Chandris, Inc. In March 1992, Mr. Latsis filed an amended complaint naming additional defendants Chandris S.A. and Fourth Transoceanic Shipping Co. Ltd., as alleged owners of the vessel (collectively "Chandris"). (Appendix, A49). Chandris answered the amended complaint and denied Mr. Latsis' allegation that he was a

seaman within the meaning of the Jones Act, 46 U.S.C. § 688. (Appendix, A44).

In June 1993, a jury trial was held in the United States District Court for the Southern District of New York ("District Court"). At the conclusion of the trial and after receiving instructions from the District Court, the jury rendered a verdict finding that Mr. Latsis was not a seaman. (Appendix, A34, A42). The jury instruction on seaman status utilized by the District Court is consistent with *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) and *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). In accordance with the jury verdict and on June 17, 1993, the District Court entered a judgment dismissing the lawsuit. (Appendix, A34).

In July 1993, Mr. Latsis appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit"). On March 24, 1994, the judgment granted to Chandris by the District Court pursuant to the jury verdict was vacated by the Second Circuit based on the Second Circuit's conclusion that the District Court's jury instruction on seaman status constituted plain error. The Second Circuit vacated the District Court's dismissal and ordered a new jury trial even though the record supported a finding that Mr. Latsis spent only ten percent of his time aboard ship. (Appendix, A1). Chandris' timely petition for rehearing to the Appellate Court was denied on May 24, 1994. (Appendix, A37).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Introduction

The test for seaman status adopted by the Second Circuit in *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994) ("*Latsis* Seaman Test") conflicts with *Wilander*, 498 U.S. 337, and the seaman status test utilized by the Fifth and Eighth Circuit Courts of Appeals. Specifically, under the *Latsis* Seaman Test, a shore-based maritime worker who spends only ten percent of his work time on vessels is eligible for seaman status. *Latsis*, 20 F.3d at 54. The *Latsis* Seaman Test conflicts with *Wilander's* dictate that shore-based maritime workers are not seamen and the Fifth and Eighth Circuits' requirement that a seaman must spend a substantial part of his work time on a vessel. *Wilander*, 498 U.S. 337; *Miller v. Patton-Tully Transp. Co.*, 851 F.2d 202 (8th Cir. 1988); and *Robison*, 266 F.2d 769.[1]

The conflict created by *Latsis* promotes confusion and disharmony between the federal and state courts charged with administering the remedies available to seamen. By exercising jurisdiction in this case and completing the

[1] A very strong argument exists that *Latsis* also conflicts with the First Circuit Court of Appeals. Although *Latsis* accurately cites *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941) as the originator of the seaman status test adopted by the Second Circuit before *Latsis*, *Latsis* ignores *Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975) and *Stafford v. Perini Corp.*, 475 F.2d 507 (1st Cir. 1973). Both *Bennett* and *Stafford* adopt the *Robison* Seaman Test used in the Fifth and Eighth Circuits. And, as discussed in more detail below, the *Robison* Seaman Test conflicts with *Latsis*. Adding to the confusion, the inconsistency between (a) *Carumbo* and (b) *Bennett* and *Stafford* is never addressed.

work left undone in *Wilander* and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), this Court can eliminate the conflict created by the Second Circuit regarding who is a seaman, as well as provide rationality, certainty and uniformity to this area of maritime law.

Background

Because of the expansive remedies afforded to seamen under the Jones Act and because the Jones Act did not define the statutory term "seaman," the question of who is a seaman has inundated the courts at least since the Jones Act was enacted in 1920. Initially, this Court defined seaman in broad terms and held that a longshoreman doing traditional seaman's work aboard a ship at the dock was a seaman. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 52 (1926). However, within six months of the decision in *Haverty*, Congress overruled *Haverty* by passing the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The LHWCA provided for the payment of compensation to all injured maritime workers, except a "master or member of a crew of any vessel . . . . " 33 U.S.C. § 902(3)(G).

The confusion created by this Court's struggle to define the term seaman between 1940 and 1958 is chronicled in *Wilander*. And, as one critic explains:

> By the end of its labors in 1958, the Supreme Court, like the Congress, had declined the invitation to provide any bright-line test for seaman status. The [C]ourt's decisions provide nothing more than clues to define the term 'seaman': (1) permanent attachment to a vessel and (2) a broad view of aid to navigation. Most significantly, however, the [C]ourt abdicated its responsibility to provide at least a theoretical foundation for the determination of seaman status.

Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-5 at 175 (West 1987) (citations omitted).

"In 1959, the Fifth Circuit attempted to find its way out of what it called 'the labyrinth,' and working from the clues offered by the Supreme Court, formulated a test for seaman status that still holds sway today." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 5-5 at 176 (West 1987). The 1959 case that formulated a seaman test in the Fifth Circuit is *Robison* ("*Robison* Seaman Test"). *Robison* holds:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission . . . .

266 F.2d at 779.

Although *Wilander* resolved the conflict between the Fifth and Seventh Circuit Courts of Appeal regarding whether a seaman must aid in the navigation of a vessel, the confusion regarding what employment-related connection to a vessel is necessary to confer seaman status on

a maritime worker has not been addressed adequately by this Court. *See* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985) (cited in *Wilander*); Kenneth G. Engerrand and Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. Tex. L. J. 431 (1983) (cited in *Wilander*); Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 Tul. L. Rev. 373 (1994).

As a result, the federal and state courts remain hopelessly confused regarding the extent of the permanency requirement necessary for a maritime worker to obtain seaman status. Robertson, 64 Tex. L. Rev. 79; Engerrand and Bale, 24 S. Tex. L. J. 431. "If one searches through the post-*Robison* decisions with enough diligence, language supporting almost any client's argument for or against seaman status can generally be found." Robertson, 64 Tex. L. Rev. at 108. "It has even been suggested that 'three men in a tub would fit within [the court's] definition, and one probably could make a convincing case for Jonah inside the whale.' " Engerrand and Bale, 24 S. Tex. L. J. at 431. Now, approximately seventy-five years of confusion about the definition of a seaman under the Jones Act has culminated in *Latsis*.

Prior to this Court's opinions in *Wilander* and *Gizoni*, the Second Circuit articulated a three part test to determine seaman status under the Jones Act. *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975) ("*Salgado* Seaman Test" or "Three-part Seaman Test"). The *Salgado* or Three-part Seaman Test is as follows:

> The vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation.

Salgado, 514 F.2d at 755.

The element of the *Salgado* or Three-part Seaman Test that required a maritime worker to be aboard a vessel naturally and primarily to aid in navigation was jettisoned by this Court in *Wilander*. 498 U.S. at 353. *Wilander* holds that a maritime worker who has a substantial sea-based, employment-related connection to a vessel in navigation qualifies as a seaman under the Jones Act even if the worker does not contribute to the navigation function of the vessel. *Wilander*, 498 U.S. at 355-357. Indeed, rather than focusing on the description of the maritime worker's job, *Wilander* (and later *Gizoni*) confirm that "[t]he key to seaman status is employment-related connection to a vessel in navigation." 498 U.S. at 355; 502 U.S. at 81. *See also Roth v. U.S.S. Great Lakes Fleet*, 25 F.3d 707 (8th Cir. 1994).

Conflict With The Supreme Court

In *Latsis*, the Second Circuit recognized the need to revise the *Salgado* Seaman Test in the wake of *Wilander* and *Gizoni*. Unfortunately, instead of conforming the new Second Circuit seaman status test to the principles articulated in *Wilander* and *Gizoni*, *Latsis* created the *Latsis* Seaman Test that conflicts with the decisions of this Court, the Fifth Circuit and the Eighth Circuit. *Wilander*, 498 U.S. 337; *Latsis*, 20 F.3d 45; *Miller*, 851 F.2d 202; *Robison*, 226 F.2d 769.[2]

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[2] *See* note 1.

The *Latsis* Seaman Test is as follows:

> The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) *the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature*; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

Latsis, 20 F.3d at 57 (emphasis added).

Although *Latsis* agrees that a substantial employment-related connection to a vessel is necessary to qualify as a seaman, *Latsis* holds that this requirement is satisfied if either the duration of the maritime worker's vessel-based employment *or the nature of the maritime worker's contribution to the vessel's mission or function is substantial.* The actual time spent aboard a vessel is not determinative. Under *Latsis*, a worker can obtain seaman status merely by proving that the worker expended a substantial amount of time and effort preparing to contribute to the function or mission of the vessel or to the accomplishment of its mission, regardless of whether the worker is a land-based or sea-based employee (and regardless of the amount of time spent on the vessel). 20 F.3d at 57.

The third element of the *Latsis* Seaman Test is contrary to the instruction of *Wilander*. Although *Wilander's* specific inquiry was limited to whether a worker must aid in the navigation of a vessel to qualify as a seaman, *Wilander* did state the following:

> Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.
>
> * * *
>
> [U]nder the Jones Act or general maritime law, seamen do not include land-based workers.
>
> * * *
>
> The 'member of a crew' exception in the LHWCA overrules *Haverty*; 'master or member of a crew' restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee.
>
> * * *
>
> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees. The LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' had been taken to include land-based employees.
>
> * * *
>
> We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones [A]ct, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law, and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction.

498 U.S. at 347-348, 353-354.

Notwithstanding *Wilander's* mandate that only sea-based workers are seamen, even land-based workers who spend ninety percent of their time and effort on shore preparing to contribute to the function of a vessel are eligible for seaman status under *Latsis*. 20 F.3d at 54. *Latsis* ignores the sea-based/land-based distinction that is critical to *Wilander*.

Examining the nature of a maritime worker's contribution to a vessel's function or mission without regard for the amount or percentage of time the worker spends aboard vessels undermines the land-based/sea-based distinction in *Wilander*. Allowing the *Latsis* Seaman Test to stand will once again thwart Congress' intent to "confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA]." *Wilander*, 498 U.S. at 347, *quoting*, *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946).

Conflict With Other Circuits

The *Latsis* Seaman Test, besides conflicting with *Wilander's* sea-based/land-based analysis of seaman status, conflicts directly with the first prong of the *Robison* Seaman Test adopted by the Fifth and Eighth Circuits.[3]

---

[3] *See* note 1.

Latsis examines and criticizes the first prong of the *Robison* Seaman Test.[4] To merit seaman status, the *Robison* Seaman Test (as amplified by *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*)) requires a maritime worker to be assigned permanently to a vessel or perform a substantial part of his work on a vessel. Under the *Robison* Seaman Test, the substantial connection necessary to warrant seaman status is a time concept determined by the duration of the worker's employment-related connection to a vessel. Thus, a land-based employee who spends only a small percentage of time aboard a vessel would not qualify as a seaman under *Robison*.

Latsis compares and contrasts the substantial connection element of the *Robison* Seaman Test with the "more or less permanent connection with the ship" prong of the *Salgado* or Three-part Seaman Test. *Latsis* concludes that the time element that is critical to the *Robison* Seaman Test is contrary to the *Salgado* Seaman Test and now conflicts with the *Latsis* Seaman Test.

Under the *Latsis* Seaman Test, a worker like Mr. Latsis who spends only ten percent of his time aboard a vessel is eligible for seaman status. *Latsis* recognizes this direct conflict:

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[4] In *Wilander*, this Court considered the second prong of the *Robison* Seaman Test. However, because the question before this Court in *Wilander* was limited to whether one must aid in the navigation of a vessel in order to qualify as a seaman, the first prong of the *Robison* Seaman Test was not analyzed.

It is clear, however, that the [Supreme] Court did not express a preference for the criteria contained in the *Robison* test. Left unclear, therefore, is just what sort of connection will amount to a substantial connection. Indeed, the Supreme Court did not even recognize, much less resolve the conflict between the criteria used to determine substantial connection under the *Robison* test and those used under the *Johnson* and *Salgado* tests.

* * *

Absent disapproval by the Supreme Court, the 'more or less permanent connection' formulation of the substantial connection requirement remains the law of this circuit. Therefore, it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit in *Robison*.

> The formulation of substantial connection followed by this circuit in *Salgado* is quite different from that followed by the Fifth Circuit in *Robison*.

20 F.3d at 52.

Moreover, the portion of the *Robison* Seaman Test that requires an examination of the duration of vessel-based employment to determine seaman status has been adopted by the Eighth Circuit Court of Appeals. *Miller*, 851 F.2d 202; *see also Slatton v. Martin K. Eby Const. Co., Inc.*, 506 F.2d 505 (8th Cir. 1974); *Petty v. Dakota Barge Service*, 730 F. Supp. 983 (D. Minn. 1989). The *Latsis* Seaman Test conflicts with the time aspect of the Eighth

Circuit's seaman test, as well as with *Wilander* and *Robison*.[5]

Confusion And Lack Of Uniformity In Interpreting An Important Issue Under The Jones Act

The *Latsis* Seaman Test confuses and complicates further an area of maritime law that could have enjoyed a brief period of stability following *Wilander* and *Gizoni*.[6]

This Court has long recognized that the federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970), *citing*,

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[5] *See* note 1.

[6] In addition to the disagreement between the (a) Second Circuit and (b) the Fifth and Eighth Circuits regarding the importance of a putative seaman's temporal employment-related connection to a vessel, the circuit courts of appeals are not consistent with respect to the basic elements of the proper seaman status test. *Cf., Bennett v. Perini Corp.*, 510 F.2d 114 (1st Cir. 1975); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941); *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994); *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 1994 U.S. App. LEXIS 14385 (3d Cir. N.J. June 13, 1994); *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1265 (1992); *Campo v. Electro-Coal Transfer Corp.*, 970 F.2d 51 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1261 (1993); *McKie v. Diamond Marine Co.*, 204 F.2d 132 (5th Cir. 1953); *Boyd v. Ford Motor Co.*, 948 F.2d 283 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1481 (1992); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Roth v. U.S.S. Great Lakes Fleet*, 25 F.3d 707 (8th Cir. 1994); *McKinley v. All Alaska Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992), and *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993).

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). The Court's "strong concern for uniformity" in admiralty law, *Moragne*, 398 U.S. at 401, is directed at maintaining the smooth flow of maritime commerce by ensuring that "all vessel operators are subject to the same duties and liabilities." *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 676 (1982). This Court granted certiorari in other areas of maritime law where the legal principles were either outdated or subject to conflicting interpretations by the circuit courts. *Howlett v. Birkdale Shipping Co., S.A.*, ___ U.S. ___, 114 S. Ct. 2057 (1994); *Wilander*, 498 U.S. 337; *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156 (1981); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975).

The current maritime law regarding what employment-related connection to a vessel in navigation is necessary to obtain seaman status is unclear.[7]

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[7] Both judges and commentators have vastly divergent views regarding the ramifications of *Wilander* and *Gizoni*. Confusion exists regarding whether *Wilander* eliminated the permanent connection element: *See Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 215 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1065 (1994) ("We do not decide whether the requirement of permanent attachment survives [*Wilander*] with respect to Jones Act coverage of persons who . . . perform core navigation functions on a traditional vessel . . . . "); *Reeves v. Mobile Dredging & Pumping Co.*, 1994 U.S. App. LEXIS 14385 (3d Cir. N.J. June 13, 1994) ("There is seemingly an unresolved issue regarding whether the 'permanent connection' requirement for seaman status has survived [*Wilander*] . . . . "); and *Folse v. Western Atlas Int'l, Inc.*, 593 So. 2d 341, 343 (La. 1992) ("*Wilander* does not mention more or less permanent attachment to a vessel or fleet of vessels . . . *Gizoni* cast further doubt on the more or less permanent attachment aspect of *Robison*, *Barrett* and *Bach*").

The Second Circuit discusses openly its conflict with the Fifth Circuit and its criticism of the lack of instruction by this Court. *Latsis*, 20 F.3d at 51-56. The Eighth Circuit is also in conflict with the *Latsis* Seaman Test.[8] *Miller*, 851 F.2d 202. Moreover, no uniformity exists among the state courts regarding the proper seaman status test.[9]

Wilander requires permanent attachment: *See Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 709 (8th Cir. 1994) ("[*Wilander* requires] 'a definite and permanent connection with the vessel[.]' "); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1192 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1265 (1992) ("[*Wilander*] reinforced the importance of the first prong of the [Three-part Seaman Test] . . . ").

Wilander endorses *Robison*: David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com., 1, (1992) ("The Fifth Circuit's *Robison* approach to seaman status was thus ringingly endorsed [by *Wilander*] . . . . "); Edward M. Bull III, *Seaman Status Revised: A Particular Guide to Status Determination*, 6 U.S.F. Mar. L. J. 547 (1994) ("[*Wilander*] call[s] for [the] uniform application of a *Robison*-style test."); Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6-9 (2d ed. 1994) ("In fact, the only lower court test of seaman status left standing after *Wilander* is that of the Fifth Circuit, the famous *Robison* test . . . "); *but see*, Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 Tul. L. Rev. 373 (1994) ("[T]his writer and other commentators believe that *Wilander's* reasoning portends the elimination of the substantial work alternative and the return to permanent assignment as the necessary vessel connection test . . . ").

[8] *See* note 1.

[9] Petitioners' survey of the fifty states reveals the following:

No state follows the *Latsis* Seaman Test.

Nine states follow the Fifth Circuit *Robison* Seaman Test. *See e.g.*, *Allen v. Mobile Interstate Piledrivers*, 475 So. 2d 530 (Ala. 1985); *Plantation v. Roberts*, 342 So. 2d 69 (Fla. 1976); *Browning v. B.F. Diamond Const. Co.*, 289 S.E.2d 268 (Ga. 1982), *cert. denied*, 459 U.S. 837 (1982); *Patterson v. Weber Marine*, 635 So. 2d 686 (La.

This Court's guidance represents the only chance to create a uniform rule of law that will ensure a consistent

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App. 1994); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991); *Texaco, Inc. v. Addison*, 613 So. 2d 1193 (Miss. 1993); *Toland v. Atlantic Gahagan Joint Venture Dredge*, 262 A.2d 886 (N.J. Super. App. Div. 1970), *aff'd*, 271 A.2d 2 (N.J. 1970), *but see, Rogisich v. Union Dry Dock & Repair Co.*, 150 A. 670 (N.J. 1930) ("member of crew doing work ordinarily performed by seaman"); *Johnson v. Gulf Coast Contracting Services, Inc.*, 746 S.W.2d 327 (Tex. App. 1988); *Tidewater Const. Corp. v. Duke*, 169 S.E.2d 585 (Va. 1969), *cert. denied*, 397 U.S. 938 (1970).

Four states follow the Three-part Seaman Test. *See e.g., Eaton v. Connolly-Pacific, Inc.*, 184 Cal. Rptr. 852 (Cal. App. 1982); *Dungey v. United States Steel Corp.*, 499 N.E.2d 545 (Ill. App. 1986), *appeal denied*, 505 N.E.2d 352 (Ill. 1987), *cert. denied*, 484 U.S. 819 (1987); *Arundel Corp. v. Jasper*, 150 A.2d 415 (Md. 1959); *Lindgren v. Tugboat Dalzellable, Inc.*, 259 N.E.2d 916 (N.Y. 1970) (uses Three-part Seaman Test), *but see, O'Brien v. New York*, 582 N.Y.S. 2d 763 (N.Y. App. Div. 1992) (uses *Robison* Seaman Test).

Six states have fashioned tests that fit no distinct category. *See e.g., Bowers v. Kaiser Steel Corp.*, 422 P.2d 848 (Alaska 1967), *cert. denied*, 388 U.S. 910 (1967) (requires performance of navigation function); *Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E.2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989) (employee aboard vessel is seaman, who must be "equal in disposition and seamanship" to ordinary persons in the calling); *Brannan v. Great Lakes Dredge & Dock Co.*, 91 N.W.2d 166 (Minn. 1958) (permanent connection required, but contradictions persist in remainder of test); *Bowery v. Hartford Acc. & Indem. Co.*, 202 S.W.2d 790 (Mo. 1947), *cert. denied*, 332 U.S. 838 (1947) (those "primarily on board to aid vessel in navigation"); *Brown v. L.A. Wells Const. Co.*, 56 N.E.2d 451 (Ohio 1944) (person working on barge is seaman); *Domandich v. Doratich*, 5 P.2d 310 (Wash. 1931) (all hands in furtherance of main object of enterprise).

Thirty-one states and the District of Columbia have no clearly articulated seaman status test under the Jones Act:

seaman test under the Jones Act regardless of the forum where a claim is filed.

Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Iowa; Kansas; Kentucky; Maine (*See Petition of Pierce*, 136 A.2d 510 (Me. 1957) (seaman test decided outside of Jones Act)); Michigan (*See Szopko v. Kinsman Marine Transit Co.*, 397 N.W.2d 171 (Mich. 1986), *cert. denied*, 483 U.S. 1007 (1987) (discussing course of seaman's employment, but giving no test for seaman status)); Montana; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; North Dakota; Oklahoma; Oregon (*See Barrell v. Brown*, 495 P.2d 733 (Or. 1972) (discusses vessel in navigation requirement only)); Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Vermont; West Virginia (*See Indiana & Michigan Elec. Co. v. Workers' Compensation Comm'n*, 403 S.E.2d 416 (W.Va. 1991) (discussing scope of Jones Act relative to LHWCA and Workers' Compensation law, but giving no test for seaman status)); Wisconsin, and Wyoming.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and exercise its jurisdiction.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and
FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 735 – August Term, 1993
(Argued December 6, 1993 Decided March 24, 1994

Docket No. 93-7704

Antonios Latsis,

Plaintiff-Appellant,

v.

Chandris, Inc., Chandris, S.A., Trans Oceanic Shipping Co., Ltd.,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT FILED: MAR 24 1994 GEORGE LANGE III, CLERK

Before OAKES, KEARSE and CARDAMONE, *Circuit Judges*.

Appeal from a judgment dismissing the complaint of Antonios Latsis who sought compensatory damages under the Jones Act for personal injuries he sustained while aboard a vessel in navigation. The jury found that Latsis was not a "seaman" and therefore returned a verdict in favor of defendants. We now hold that the jury instructions were erroneous and resulted in substantial prejudice to Latsis.

Remanded for retrial with jury instructions in accordance with this opinion. Judge Kearse dissents in a separate opinion.

Lewis Rosenberg, New York, NY (Barry I. Levy, Shapiro, Shiff, Reilly, Rosenberg & Fox, of counsel), *for Plaintiff-Appellant.*

William J. Brady, III, New York, NY (Christ Stratakis, Poles, Tublin, Patestides & Stratakis, of counsel), *for Defendants-Appellees.*

OAKES, *Senior Circuit Judge:*

This case causes us to re-examine the definition of seaman as charged in Jones Act cases in light of two recent opinions of the Supreme Court: *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337 (1991), and *Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S. Ct. 486 (1991) (explicating *Wilander*). Specifically, we must determine whether an "employment related connection to a vessel in navigation" must be substantial either in terms of the plaintiff's "permanent assignment to the vessel" or "performance of a substantial part of his work on the vessel." A subsidiary question is whether the district court properly instructed the jury that it could not consider the period of time a vessel was in drydock in determining whether the plaintiff performed "a substantial part of his work on the vessel." We find that, although *Wilander* overrules the "aid to navigation" element of *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975), the "more or less permanent connection" requirement articulated in *Salgado* remains the law of this circuit. In ignoring this

formulation and adopting an alternative formulation, the district court misapplied the law and committed plain error. This error resulted in substantial prejudice to Latsis because the jury was effectively instructed to determine the substantiality of Latsis's connection to the vessel solely on the basis of Latsis's temporal relationship with the vessel. This prejudice was compounded by the district court's further instruction that the time the vessel was in drydock could not be considered – an instruction that improperly served to limit the substantiality of Latsis's connection to the vessel in terms of Latsis's temporal relationship with the vessel. We vacate the judgment of the United States District Court for the Southern District of New York, Loretta Preska, *Judge*, and remand for a new trial.

I. Background

A. Facts

Antonios Latsis brought this action under the Jones Act for compensatory damages for personal injuries sustained by Latsis culminating in the loss of sight to his right eye. These injuries allegedly resulted from the negligence of the ship's doctor who failed to treat promptly Latsis's detached retina. Latsis alleges that he sustained these injuries while employed as a "seaman" aboard a cruise ship then known as the S.S. Galileo, one of a fleet of cruise ships owned and operated by appellees Chandris, Inc., Chandris, S.A. and Trans Oceanic Shipping Co., Ltd. (hereinafter "Chandris").

The injuries are said to have resulted from medical malpractice by the ship's doctor on May 14, 1989, a

Sunday on which the Galileo took on passengers at Baltimore, Maryland, for a regularly-scheduled, round trip cruise of five days to Bermuda. Around noon of that Sunday, while the vessel was still in port, Latsis, on board and assigned to the Galileo in his capacity as a supervising engineer for Chandris, began experiencing a central visual disturbance which seemed to originate in the bottom portion of his eye. As the day progressed the obstruction to his vision expanded. Latsis did not appreciate the significance of the problem until the time approached to sail in the late afternoon, when he sought medical guidance from an on board nurse who advised him to see the ship's doctor at once. He did so as the ship pulled from the dock in the port of Baltimore. Once in the ship hospital, he consulted Dr. Gonzalez, the physician employed by Chandris for this vessel. Dr. Gonzalez looked at Latsis's eye through an ophthalmoscope and said it appeared to him to be a detached retina. Gonzalez recommended that Latsis relax until he could see an eye specialist when they arrived two days later in Bermuda. Latsis received no further medical care until after the ship arrived in Bermuda, and no attempt was made to transport him ashore for prompt medical care by means of a pilot vessel, helicopter, or otherwise. During this interval, the impairment of his vision continued to intensify until all central vision in the eye was lost.

The malpractice allegations relate to the fact that Dr. Gonzalez, unlicensed in any state in the United States, neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that " . . . any patient with a suspected or established retinal detachment should be seen on an emergency basis

by an ophthalmologist." When the vessel reached Bermuda, a doctor diagnosed his eye as having a massive detachment of the retina. The doctor recommended immediate hospitalization. After a consultation with Latsis's regular eye doctor in New York and another New York eye specialist, the doctors recommended surgical reattachment of the retina. Although Latsis underwent surgery, the end result was that he lost 75 percent of his central vision and can only see light on the sides of his right eye.

At the time Latsis presented himself for treatment in Bermuda, he was given a Chandris form signed by the ship's captain, chief purser, and Dr. Gonzalez, requesting medical attention be provided to Latsis for his "detected [sic, detached] retina" and describing Latsis as a "crew member" holding the "position" of "supt.engineer."

Evidence in the case indicated that Latsis, a naturalized American citizen of Greek ancestry, has had a lifelong involvement with the sea and shipping beginning with his entry into the Merchant Marine as a cadet in Germany following his graduation from high school, his sailing aboard a merchant ship as a second mate following successful completion of his studies and examinations, and finally with his being appointed captain of a small Mediterranean vessel. Thereafter, he became chief mate on a larger vessel. He came to the United States in 1967 and promptly became a United States citizen. He was employed in San Francisco with a firm of ship surveyors while continuing his education at the University of California at Berkeley. In 1973 he was awarded a Bachelor's Degree of Science and Mechanical Engineering from Berkeley and a year later received a Master's Degree

in Naval Architecture, working in the Maritime Industry during this time for the Pacific Marine Association in the ports of San Francisco and Oakland. After graduation he went to New York to work for the American Bureau of Shipping, and later for Southern Star Shipping Company as a superintendent and engineer. He supervised Southern Star's vessels' operations and maintenance for 11 years before becoming employed in 1989 by Chandris out of its Miami, Florida office.

Chandris operated a large fleet of merchant vessels, five of which sailed from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico. For the first three months, Latsis was employed as a consultant and thereafter became a salaried employee. His duties were not confined to any single vessel but ran to the whole fleet. Latsis's duties included not only overseeing the vessels' engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore. While he necessarily familiarized himself with all of the vessels' power plants and engineering functions, he attended several hands-on repairs in a supervising capacity and monitored problems that the ships had or could develop. He was particularly in charge of the electronic equipment, both retrofit and existing equipment.

Latsis's work required him to travel with various ships in the fleet from time to time. The evidence here was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent. Latsis maintained his family and residence in Rye, New York, although the

company provided him with housing and the use of a rental car in Miami because his office work was regularly there. The vessel on which he was sailing and with which he had more connection than any other vessel in the fleet was the 27-year-old S.S. Galileo, as it was then known, aboard which he had sailed from Miami to Mexico with specialists from Germany to plan for a conversion and upgrading scheduled to take place in Germany in the following year. He helped draw specifications to keep the older ship in repair while sailing on its cruise routes to Mexico and Nassau in the Bahamas. In fact, he had been on board the Galileo at the conclusion of a regular two-day cruise originating from and returning to Baltimore, having joined the ship there on Friday, March 12, two days before the scheduled trip to Bermuda during which his eye injury occurred as above stated. On the Baltimore-Bermuda trip, Latsis was responsible for escorting various shipyard personnel around the ship in connection with the upcoming conversion of the vessel. In fact, he was busy with these people after he first noticed the problem with the vision in his right eye at about noon on Sunday, May 14, up until the time of sailing when he finally went to see the ship's nurse who sent him to Dr. Gonzalez.

According to Demetrius Kaparis, who was a senior vice president of Chandris, Inc. and head of its technical department and technical operations before it was taken over by Celebrity Cruises, Inc., Latsis was hired on a regular basis as a superintendent/engineer with the specific work of supervising the electronic systems of their ships and also upgrading the computerized systems and the computerized communication between the ships and

the Chandris Miami office. The company had five superintendent/engineers, two in Miami and three in Greece, and all of the engineering department of the ships and masters of the ships reported to Kaparis for technical matters. The Chandris vessels, depending upon size, carried between 12 and 14 licensed engineers on board, and Kaparis supervised six vessels, all passenger cruising ships customarily calling in at New York, Boston, Philadelphia, Baltimore, Charleston, Wilmington, Miami, and San Juan. Usually, a vessel would be in home port about every seven days. Occasionally, depending on her itinerary, the ship would return to home port after a two or five day cruise. Vessels were usually in home port between 9 and 14 hours. Each ship had a superintendent/engineer, completely responsible, who reported to Kaparis directly. No vessels were assigned to Latsis "because he was taking care of the electronics systems of the ships." in other words, the whole fleet. Latsis reported to Kaparis.

Following Latsis's surgery and recuperation, lasting approximately six weeks, during which he received full pay, he resumed his duties in July, 1989, in Miami, and on September 30 sailed with the Galileo to Bremerhaven, Germany, where the vessel was placed in drydock. The conversion of the vessel was a $65 million job during the course of which the vessel's bottom plates and propeller were removed, the conversion being completed in March, 1990, and the vessel being renamed the Meridian. Latsis, who had been with the vessel the entire time it was in drydock in Bremerhaven, sailed back to the United States aboard the Meridian and continued to work for Chandris until November, 1990, at which time his employment

with Chandris terminated. Suit was filed in October, 1991. The district court had subject matter jurisdiction under 28 U.S.C § 1331 (1988), and 46 U.S.C. app. § 688 (1988).

B. Proceedings Below

Trial lasted four days. In the charge to the jury, the judge told the jury that the plaintiff must prove, by a preponderance of the evidence, four elements, namely, that he was a member of the crew of a vessel acting in the course of his employment, that is, that he was a seaman; second, that the defendants were his employer; third, that the defendants or an officer, employee, or agent of one of them was negligent; and, fourth, that such negligence played a part in bringing about the injury to the plaintiff. As to the first element, the jury was told that it could find that the plaintiff was a seaman if the jury found, by a preponderance of the evidence, two things:

> First, the plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may *not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation.* You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers. (emphasis added).

The second element was stipulated to, and that was that plaintiff's capacity and duties performed "contributed to the function of the vessel or the accomplishment

of the vessels' mission or to the operation or maintenance of the vessels during their movements or while at anchor for the vessels' future trips." The court instructed that the second element involved in proving seaman status had been met, and that in considering whether plaintiff has otherwise proved seaman status, "you should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer."

Latsis did not object to these instructions in their entirety. Latsis did object, however, to that portion of the charge that "explicitly takes from the jury's consideration the period of time that the Galileo was in drydock in Germany." The jury returned a verdict in favor of Chandris solely on the issue of Latsis's status as a "seaman" pursuant to the Jones Act. On June 17, 1993, the clerk entered a final judgment. On July 15, 1993, Latsis filed a timely notice of appeal. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1988).

We now hold that the jury instructions were an erroneous application of the law. We therefore remand the case for retrial with jury instructions in accordance with this opinion.

II. Standard of Review

Normally, we will not consider a challenge to a jury charge if a party failed to object at trial. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection"). Thus, where "no timely objection was

made to the instruction or to the interrogatories in the district court . . . we may reverse on this ground only if 'the district court committed plain error in its charge and interrogatories.'" *Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1078 (2d Cir. 1993) (footnote omitted) (quoting *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 636 (2d Cir. 1986)). An error is plain "if it results in a miscarriage of justice, or if it is an obvious instance of misapplied law." *Abou-Khadra*, 4 F.3d at 1078; *Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 493-94 (2d Cir. 1985). Although even a plain error will not warrant reversal if it is harmless, we will reverse where a plainly erroneous instruction misapplies the law as to a core issue in the case resulting in the substantial prejudice of the party challenging the instruction on appeal. *Schaafsma*, 802 F.2d at 637; *see* Fed. R. Civ. P. 61. Although Latsis objected to the drydock portion of the instruction, he failed to object to the instruction as a whole. We therefore review Latsis's claim under the plain error standard.

III. Discussion

A. The Definition of "Seaman" in the Second Circuit before *Wilander*

Prior to the Supreme Court's recent opinions in *Wilander* and *Gizoni*, this circuit's definition of "seaman" under the Jones Act was three-pronged:

> "the vessel must be *in navigation*, there must be a *more or less permanent connection* with the ship, and the worker must be aboard naturally and primarily as an *aid to navigation*."

Salgado, 514 F.2d at 755 (quoting *Klarman v. Santini*, 503 F.2d 29,33 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), and *Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966)) (emphasis added to distinguish the prongs). For convenience, we denominate these prongs (1) the "vessel in navigation," (2) the "substantial connection," and (3) the "aid to navigation" elements.[1] The Second Circuit test very closely followed the test first adopted by the First Circuit in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941) (citations from sundry circuit courts omitted). Cases in several other circuits also had adopted essentially the same test. *See, e.g., McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953) (defining "member of a crew" in accordance with the three-pronged test); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 388 (6th Cir.) (laborers employed in dredging operations to level off gravel pumped up from river bottom and pumped onto barges held to be seamen under the Jones Act), *cert. denied*, 346 U.S. 817 (1953); *Rackus v. Moore-McCormick Lines, Inc.*, 85 F. Supp. 185, 187 (E.D. Pa. 1949); *see also* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 94 (1985) (the "Robertson article").

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[1] As a minor matter, we note that *Wilander* refers to this element as "aid *in* navigation." Other courts have used the phrase "aid *to* navigation." To emphasize the difference between this element and the "vessel *in* navigation" element, we use the phrase "aid *to* navigation."

B. The Demise of the "Aid to Navigation" Element – *Wilander*

Early on, the Fifth Circuit, in *Offshore Co. v. Robison*, 266 F.2d 769, 779-80 (5th Cir. 1959), criticized the "aid to navigation" language of the three-pronged test:

> Our review of the cases shows this [aid to navigation] test has been watered down until the words have lost their natural meaning. . . . With due deference to the Supreme Court, we attach less importance to either of these catchphrases than we do to the cases piled on cases in which recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation and is a member of the ship's company only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured.

Id. at 780 (jury question raised whether roughneck as member of drilling crew was a seaman working on main deck of a mobile drilling platform or barge resting on the bottom of the Gulf of Mexico). After review of the Supreme Court and other relevant case law, the *Robison* court reformulated the criteria for seaman status:

> there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in

> terms of its maintenance during its movement or during anchorage for its future trips.

Robison, 266 F.2d at 779 (footnote omitted).[2] Thus, the Fifth Circuit abandoned the "aid to navigation" element of the common law definition of seaman in favor of language that reflected the tendency of the courts to extend seaman status to employees who do what the Supreme Court would eventually call "the ship's work." *See Wilander*, 498 U.S. at 355.

The *Robison* test differs from the three-pronged test in two other significant respects, however. First, the *Robison* test dropped the first prong of the test, that is, the "vessel in navigation" element. Second, the *Robison* test replaced the more or less permanent connection prong of the test with the following requirement:

> the injured workman [must have been] assigned permanently to a vessel . . . or [must have] performed a substantial part of his work on the vessel.

Robison, 266 F.2d at 779 (footnote omitted).

Eventually, the *Robison* test became the accepted test of the Fifth Circuit. *See, e.g., Balfer v. Mayronne Mud & Chem. Co.*, 762 F.2d 432, 434 (5th Cir. 1985). This court, however, retained the three-pronged test. *See, e.g., Salgado*, 514 F.2d at 755; *Buccellato v. City of New York*, 808 F. Supp 967, 971 (E.D.N.Y. 1992). In *Johnson v. John F. Beasley Constr. Co.*, 742 F. 2d 1054, 1062-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), the Seventh Circuit

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[2] We note again that the jury instructions in this case are substantially based upon the *Robison* test.

attempted to highlight the difference between the two tests, focussing on the "aid to navigation" prong of the three-pronged test and the significant contribution aspect of the *Robison* test. Reasoning that the significant contribution aspect of the *Robison* test was "too broad," the Seventh Circuit adopted yet another test for seaman status – one combining the "more or less permanent connection" and the "vessel in navigation" elements of the three-pronged test and a requirement that "the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Id.* at 1063.

The Supreme Court in *Wilander* addressed the conflict between the Fifth Circuit's *Robison* test and the Seventh Circuit's *Johnson* test, *Wilander*, 498 U.S. at 340, but only as to one difference between the two tests – the aid to navigation requirement. The Supreme Court jettisoned the "aid to navigation" element, and announced that "the better rule is to define 'master or member of a crew' under the [Longshore and Harbor Workers Compensation Act], and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation." *Wilander*, 498 U.S. at 353, 354. The Court observed, that "[t]his rule best explains our case law and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction." *Id.* at 354. The Court continued to write, "It is not the employee's particular job that is determinative, but the employee's connection to a vessel," *id.*, and concluded that "[t]he key to seaman status is employment-related connection to a vessel in navigation." *Id.* at 355.

In so doing, the Court adopted only so much of the *Robison* test as required that a seaman's duties " 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " *Wilander*, 498 U.S. at 355 (quoting *Robison*, 266 F.2d at 779). The Court did not adopt the *Robison* test in its entirety. Indeed, the Court cited, with apparent approval, the Robertson article which called for revision of the *Robison* test, stating that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* As we discuss more fully below, the Court did not follow *Robison*'s departure from the "vessel in navigation" element of *Salgado*. On the contrary, the Court's language, "[t]he key to seaman status is employment-related connection to a *vessel in navigation*," *id.* (emphasis added), confirms that this element remains an important part of the definition of a seaman. Also, the Court expressly noted that, "[w]e are not called upon here to define this connection in all details." *Id.* Further, the Court in *Wilander* did not state that an employment-related connection to a vessel was a complete definition of seaman. *See id.* at 355 (stating that "we hold that a *necessary* element of the connection is that a seaman perform the work of a vessel") (emphasis added). The Court offered no indication as to whether the substantiality of the connection must still be established or, if so, whether it would be determined pursuant to the "more or less permanent connection" element of the "*Johnson* test" (as well as the three-pronged *Salgado* test) or pursuant to the language of the two-part *Robison* test.

C. The "Substantial Connection" Element after *Wilander*

As discussed above, the Supreme Court in *Wilander* did not determine under what circumstances an employment related connection with a vessel in navigation would be sufficiently substantial to qualify a plaintiff for seaman status. It is clear, however, that the Court did not express a preference for the criteria contained in the *Robison* test. Left unclear, therefore, is just what sort of connection will amount to a substantial connection. Indeed, the Supreme Court did not even recognize, much less resolve the conflict between the criteria used to determine substantial connection under the *Robison* test and those used under the *Johnson* and *Salgado* tests. Again as noted above, the Court limited its holding to the "aid to navigation" element of the three-prong test, concluding that "[t]he key to seaman status is employment-related connection to a vessel in navigation," but declined "to define this connection in all details." 498 U.S. at 355.

Nor does the Supreme Court's opinion in *Gizoni* offer much guidance in the way of what constitutes a substantial connection. In *Gizoni*, decided after *Wilander*, the Court held that a maritime worker whose occupation is one of those enumerated in the LHWCA may be nevertheless a seaman within the meaning of the Jones Act, at least where the harbor worker is also a "member of a crew of any vessel," as explained in *Wilander*. *Gizoni*, 112 S.Ct. at 491. The *Gizoni* Court quoted *Wilander* in saying that "'[t]he key to seaman status is employment-related connection to a vessel in navigation. . . . It is not necessary that a seaman aid in navigation or contribute to the

transportation of the vessel, but a seaman must be doing the ship's work.' " *Id* at 492 (quoting *Wilander*, 498 U.S. at 355). No mention is made in either *Wilander* or *Gizoni* of the "permanent connection" language in the *Robison* case.

In this case, there is no question that Latsis at the time of his injury, was connected to a vessel in navigation, that his connection was employment-related, and that at least at the time of his injury he was "doing the ship's work," namely, action as a supervising engineer on board the vessel. In fact, it is precisely this part of the jury charge to which Chandris stipulated. Whether this connection was substantial, however, was in dispute. In charging the jury on this question, the district court appears to have adopted language from the two-part *Robison* test, instructing the jury that to find Latsis a seaman they must find that:

> First, the plaintiff was either permanently assigned to a vessel or performed a substantial part of his work on the vessel.

See Robison, 266 F.2d at 779 ("the injured workman [must have been] assigned permanently to a vessel . . . or [must have] performed a substantial part of his work on the vessel.") (footnote omitted). Absent disapproval by the Supreme Court, the "more or less permanent connection" formulation of the substantial connection requirement remains the law of this circuit. Therefore, it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit in *Robison*.

The formulation of substantial connection followed by this circuit in *Salgado* is quite different from that followed by the Fifth Circuit in *Robison*. The more or less

permanent connection element of the *Salgado* test is not merely a temporal concept. Under *Salgado* the substantial connection element is satisfied where there is a "more or less permanent connection with the ship." *See, e.g, Salgado*, 514 F.2d at 755 (internal quotation marks omitted). Later cases expanded the "substantial connection" element to include connections not just to one particular ship, but to an identifiable group of vessels.[3] *See Magnolia Towing Co. v. Pace*, 378 F.2d 12, 13 (5th Cir. 1967) (per curiam) (pilot connected with several of defendant's tugboats held a seaman); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir. 1960) (holding that a master mechanic and an assistant who performed all maintenance, repair and overhaul work on several of defendant's ferries, often while ferries were operating, could be seamen); *see also Guidry v. Continental Oil Co.*, 640 F.2d 523, 528 n.14 (5th Cir.) ("relationship between the individual and an identifiable vessel or *group of vessels* must be substantial in point and time, not spasmodic") (emphasis added), *cert. denied*, 454 U.S. 818 (1981); *Rotolo v. Halliburton Co.*, 317 F.2d 9, 12-13 (5th Cir.) (injured

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[3] The Robertson article refers to this rule as "the 'Fleet Amendment' to the *Robison* Test," 64 Tex. L. Rev. at 96. It goes on to suggest that the fleet cases present an "obvious doctrinal problem" because "[i]nvolvement with a single vessel, as opposed to multiple vessels, was one of the most obvious distinctions between the traditional seaman and the traditional longshoreman." *Id.* at 98. We cite these cases in support of the proposition that a person can be a "seaman" although he was not assigned to a particular vessel, but rather connected with several vessels or with a fleet. We do *not* adhere to the permanency requirement of these cases.

person must have been assigned to or performed a substantial part of his work on "a particular vessel or several specified vessels.") (citing *Braniff*), *cert. denied*, 375 U.S. 852 (1963).[4]

As pointed out by Judge Glasser in *Buccellato*, the substantial connection requirement has not been interpreted by the courts of this circuit in a narrow temporal sense. *Buccellato*, 808 F. Supp. at 972. As Judge Glasser observed, *Salgado*, quoting two earlier decisions, *Klarman* and *Harney*, only required that plaintiff have a "*more or less* permanent connection with the ship." *Salgado*, 514 F.2d at 755 (emphasis added). The court in *Klarman* had noted that the permanent connection requirement has not been read strictly but meant that the connection must be more than "temporary or transitory." *Klarman*, 503 F.2d at 33 (quoting *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 394 (9th Cir. 1973) ("Significantly, the connection may be less than permanent, but it cannot be temporary or transitory")). In *Harney*, the court noted, but did not

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[4] We underscore that both the test that we last explicated in *Salgado* and the Supreme Court's *Wilander* test speak of "connection" rather than "assignment" to a vessel. We note also that the charge in question, like the *Robison* test, referred to "assignment" rather than "connection," and in this sense might have been particularly confusing to the jury because Latsis was not "assigned" to the S.S. Galileo except temporarily from time to time. Rather, he was responsible for a fleet of vessels as to which it has long been held a person may be a seaman. *See, e.g., Guidry*, 640 F.2d at 529. It is true that the instruction here did go on to say that "vessel" could be a single ship or a number of ships owned and operated by the employer, so to that extent it took the "Fleet Amendment" into account. But this caveat did not make the charge any the less confusing.

decide, that the permanent connection requirement may include "shore-based employees who, though regularly coming aboard, spend less than a full shift there." *Harney*, 359 F.2d at 654.

An earlier Second Circuit case, not mentioned by Judge Glasser, is even more supportive of his conclusions in *Buccellato* that "the case law in this Circuit does not unequivocally require a Jones Act seaman to be substantially connected to a vessel or group of vessels as opposed to being connected to a vessel or group of vessels on a steady basis." *Buccellato*, 808 F. Supp. at 972. That is the case of *Weiss v. Cent. R.R. Co. of New Jersey*, 235 F.2d 309 (2d Cir. 1956). There, a plaintiff who in the course of his 19-day employment worked seven days on ferry boats as a deckhand or wheelsman and on six other days was employed on shore as a doorman or bridgeman, jobs connected with the docking and departure of ferries, was held a Jones Act seaman. The court noted that weighing against his claim were the factors that he was employed aboard ship for only a short period of time, that during that period he slept and ate most of his meals ashore, that he was paid an hourly wage and worked for the most part an eight-hour day, that he was employed for part of the time on jobs ashore, that he was working on an extra-man rather than on a regular basis, and that he had no seaman's papers. 235 F.2d at 311. Further, the *Weiss* Court cited *Bailey v. City of New York*, 55 F. Supp. 699 (S.D.N.Y. 1944), *affirmed*, 153 F.2d 427 (2d Cir. 1946), which held that a ferry boat engineer who worked a regular eight-hour day and slept at home was a seaman, as was a similar land-based dredge employee in *Pariser v.*

City of New York, 146 F.2d 431 (2d Cir. 1945). *See Weiss*, 235 F.2d at 3132.[5]

Unlike the *Salgado* formulation of the substantial connection requirement, the language of the *Robison* test frames the substantial connection issue primarily, if not solely, in temporal terms. Specifically, the *Robison* test provides that:

> there is an evidentiary basis for a Jones Act case to go to the jury . . . if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel.

Robison, 266 F.2d at 779 (footnote omitted). Early cases applying this test recognized that "the word 'permanent' has never been assigned a literal interpretation under the Jones Act and should not be given a 'wooden application,' but rather, is to be used as an analytical starting point instead of a self-executing formula." *Guidry*, 640 F.2d at 529 (citations omitted). Through subsequent applications of this test, however, the Fifth Circuit clearly expressed its view that substantial connection is a temporal concept to be determined by the duration of the putative seaman's connection to the vessel. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074-75 (5th Cir. 1986)

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[5] Judge Nygaard, in dissent, has made a similar observation in the Third Circuit. *Evans v. United Arab Shipping Co.*, 4 F.3d 207 at 220-21 (3d Cir. 1993) (Nygaard, dissenting) ("under Third Circuit law the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the worker's duties as they relate to the ship and the ship's mission at the time of the injury").

(en banc); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 & n.6 (5th Cir. 1980).[6]

By adopting the *Robison* test for a substantial connection, the district court limited the jury's consideration to Latsis's temporal relation to the vessel. This substantially prejudiced Latsis. Had the jury not been instructed to determine whether Latsis's contribution to the vessel was substantial only in temporal terms of "permanent assignment" or having performed a substantial part of his work aboard the vessel, the jury could well have found Latsis to be a seaman. A jury could find that he did have a substantial connection with the vessels though he may not have been on board ship a great percentage of his time because he did the specific work of supervising the

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[6] In a dissenting opinion, Judge Rubin, joined by five other judges, took issue with the majority's narrow interpretation of the substantial connection requirement as purely temporal concept. Judge Rubin wrote:

> [a plaintiff's] status as a crew member, vel non, should be determined by considering the transitory duration or fixed term of the assignment, the nature of his duties during it, and the relationship of those duties to the mission of the vessel. Thus, a fact finder might find that an anchor handler who is assigned to work on a specific vessel for a period of days is a crew member during that assignment. A worker may also be assigned to work as a crew member for a series of voyages of limited duration. . . . An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment.

Barrett, 781 F.2d at 1077 (Rubin, J., dissenting).

electronics systems of the ships, upgrading their computerized systems, and dealing with the computerized communication between the ships and office. Thus a jury could have found a substantial connection even though Latsis's work did not involve "permanent assignment" to a vessel or to a fleet of vessels and even if we take, as the jury might have taken, Kaparis's testimony that Latsis was on board ships only 10 percent of the time at face value. We therefore hold that the district court's instruction erroneously applied the law of this circuit regarding a core element of Latsis's claim – to the substantial prejudice of Latsis.

D. The "Drydock Instruction"

We turn now to the district court's "drydock instruction." As noted above, the district court instructed the jury:

> In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation.

In so instructing, the district court seems to have injected the third prong of the old *Salgado* test – "vessel in navigation," into the substantial connection requirement. We find that this instruction further emphasized the putative seaman's temporal connection to the vessel at the risk of confusing the jury and frustrating the underlying policy of the Jones Act.

Even before the enactment of the Jones Act in 1920, Learned Hand, in extending seaman status to a bartender

on board a vessel, remarked that there is "in principle no reason why there should be an artificial limitation of rights to those engaged in the navigation of the ship, to the exclusion of others who equally further the purposes of her voyage." *The J.S. Warden*, 175 F. 314, 315 (S.D.N.Y. 1910). Judge Hand's words capture the spirit of the Jones Act, to compensate those injured in the course of work exposing them to the perils of the sea. This spirit is captured in the "vessel in navigation" element. Moreover, this element of the three-pronged test for seaman has survived *Wilander*. *See Wilander*, 498 U.S. 355 ("the key to seaman status is employment-related connection to a vessel *in navigation*") (emphasis added).

Courts have interpreted "perils of the sea" broadly. Not only may seamen recover under the Jones Act for injuries traditionally associated with the sea – a swinging boom, a sinking ship – but seamen may recover for injuries more commonly experienced by land-based employees. *See, e.g., Pace*, 378 F.2d at 12 (recovery allowed for seaman injured in automobile accident while en route to vessel). In this case, Latsis's employment did expose him to the perils of the sea – in fact, his injury was result of such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician. If that physician is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling. Not every worker connected with a vessel is exposed to the perils of the sea, however. On the contrary, only workers connected to a "vessel *in navigation*" are so exposed – even if the exposure results in nothing more than an injury sustained

while driving to the vessel. *See id.* The "vessel in navigation" element, therefore, does not limit the substantiality of an employee's connection with a vessel. Rather, the "vessel in navigation" element was designed to limit seaman status to those whose employment regularly exposes them to the hazards of the sea.

We note that the case upon which the district court evidently relied, in instructing the jury that in considering the substantial connection element it should discount the time during which the Meridian, formerly the S.S. Galileo, was in drydock in Germany, involved an accident while the vessel was in drydock and, hence, not in navigation. *See McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569-70 (9th Cir. 1992). *McKinley* may properly be read as holding that a ship undergoing complete conversion, as the vessel was in that case, takes a vessel out of navigation. *See West v. United States*, 361 U.S. 118, 121 (1959) (per curiam) (non-Jones Act case finding no warranty of seaworthiness while vessel was undergoing major structural repairs). But this does not necessarily mean that the time during which a vessel is undergoing conversion cannot count towards the substantiality of an employment-related connection with the vessel. During the course of Latsis's employment with Chandris – omitting the consulting time – from approximately March of 1989 until his termination in November, 1990, he spent some six months working seven days a week on board the vessel, supervising the project as the only naval architect, including the drydocking, bottom removal, cleaning and removal of the propellers, overhauling the main engines, rebuilding the boilers, and reconstructing the accommodation spaces and public rooms. Why this time

should not count in terms of determining the substantiality of his connection to the Chandris vessels, we do not know. While we express no opinion as to whether Latsis would have been covered had he been injured while the vessel was in drydock in Bremerhaven, we do suggest that in terms of meeting any requirement of connection to the vessel or vessels, this time can count.

IV. CONCLUSION

Although *Salgado*'s formulation of the substantial connection element remains the law of this circuit after *Wilander* and *Gizoni*, we think it useful to clarify this formulation in light of *Wilander* and *Gizoni*. Such clarification is made all the more pressing by the fact that although *Wilander* and *Gizoni* left *Salgado*'s formulation of the substantial connection requirement intact, the Supreme Court in those cases did jettison another aspect – the aid to navigation element – of that test.

Clarification is also important considering that the Fifth Circuit has continued to adhere to its narrow interpretation of the substantial connection requirement. In *Bach v. Trident Steamship Company, Inc.*, 920 F. 2d 322 (5th Cir.), *vacated*, ___ U.S. ___, 111 S. Ct. 2253 (1991), two members of the panel held that a compulsory pilot was not a seaman because he was not connected to a vessel or an identifiable fleet of vessels, and refused to find an exception in favor of a maritime worker who spends virtually all of his time performing traditional seaman's duties – work closely related to the movement of vessels – but does his work on short voyages aboard a large number of vessels. Judge Brown dissented, stating that

Congress did not mean to exclude from the protection of the Jones Act compulsory pilots while aboard in directing the navigation of a vessel. *See Bach*, 920 F.2d at 327-33 (Brown, J., dissenting). The Supreme Court vacated the opinion and remanded for reconsideration in light of *Wilander*. ___ U.S. at ___, 111 S. Ct. at 2253. The panel majority reinstated its decision, holding that it had previously "concluded that [the pilot] was not a seaman because he was not permanently assigned to any particular vessel or fleet of vessels." *Bach v. Trident S.S. Co., Inc.*, 947 F.2d 1290, 1291 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992). Judge Brown again dissented, stating that "although *Wilander* turns out not to be the decisive guide," what it does say affords "undeniable support" to the views he had set forth in his initial dissent. *Bach*, 947 F.2d at 1291 (Brown, J., dissenting). In addition, he quoted the *Wilander* case extensively and we may read him as saying that at least in the case of a pilot and his unique status as a seagoing functionary, the requirement of "permanency" set forth in the various cases as a part of the test is simply no longer of force and effect, at least in the temporal sense.

The substantial connection requirement has two purposes. First, by requiring a "more or less permanent connection *with a vessel*" or with a fleet of vessels, it excludes from Jones Act seaman status workers whose work may bring them into contact with many vessels but who are not connected with any particular vessel or identifiable group of vessels. Through this exclusion, the substantial connection element leaves workers with no connection to a particular vessel or group of vessels to coverage under the Longshore and Harbor Workers'

Compensation Act (LHWCA) – from which "seaman" or, more precisely, "a master or member of a crew of any vessel" are themselves excluded. 33 U.S.C. § 901 *et seq.* (1988). Second, by requiring a "*more or less permanent connection* with a vessel" or fleet of vessels, it excludes from coverage those whose contribution, although limited to a single vessel or fleet of vessels, was nevertheless only a temporary or transitory connection with the vessel. *See Klarman*, 503 F.2d at 33 (putative seaman's connection must be more than "temporary or transitory").

It seems that much of the confusion surrounding "more or less permanent connection with a vessel" language is attributable to the fact that the language is designed to perform two functions – i.e., exclude two different types of workers from seaman status. *See Buccellato*, 808 F. Supp. at 972. Indeed, the Fifth Circuit's adherence to a narrowly interpreted permanent assignment requirement has been criticized by the Supreme Court of Louisiana on essentially this ground. *Folse v. W. Atlas Int'l, Inc./Downhole Seismic Servs.*, 593 So. 2d 341 (La. 1992).

In *Folse*, the plaintiff had been held by the Louisiana Court of Appeal not to be a seaman because he was not permanently attached to a specific vessel or an identifiable fleet of vessels. *See Folse v. W. Atlas Int'l, Inc.*, 580 So. 2d 482 (La.App. 4th Cir. 1991), *rev'd*, 593 So.2d 341 (La. 1992). In reversing, the Supreme Court of Louisiana discussed the permanent attachment language of *Robison* and *Bach*, saying that "[t]his requirement was designed to distinguish between transitory, land-based employees and those working aboard a vessel for a voyage." 593 So. 2d at 343 (citing the Robertson article). The majority

pointed out that *Wilander* did not mention more or less permanent attachment to a vessel or fleet of vessels,[7] and that *Gizoni* cast further doubt on this requirement because Gizoni "only 'rode' the platforms during working hours." *Id.* The Louisiana court went on to say that Folse was not a land-based worker providing shore services to docked vessels but rather a seaman who went to sea on specific short voyages and who was not merely a transitory employee. The court went on to say that although Folse's assignment was less transient than Bach's, it was not permanent. Rather, "[i]t involved substantial work on given missions." *Id.*[8]

We find that much confusion could be alleviated by breaking down the "more or less permanent connection with a vessel" language into two separate elements. Thus, the substantial connection requirement is met where the putative seaman establishes an employment-related contribution that is (1) limited to a single vessel or group of vessels and (2) substantial in terms of its (a) duration and (b) nature. In considering whether the putative seaman's contribution is substantial in terms of its duration, the jury may consider the number and frequency of similar contributions to that vessel or to an identifiable fleet of

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[7] Justice Dennis, concurring in the *Folse* majority, suggested "that the *Robison* requirement of permanent attachment is subsumed in the greater definition of *Wilander* that to qualify as a seaman, an employee must contribute to the function of a vessel." 593 So. 2d at 344 (Dennis, J., concurring).

[8] The same is true of Latsis, except that on shore Latsis was directly involved with the electronic communications and equipment of the Chandris fleet, surely of considerable importance to their navigation.

vessels. Further, in considering whether the contribution is substantial in terms of its nature, the jury may consider the amount of time and effort spent ashore preparing for the contribution, as well as the amount and time and effort spent in drydock consummating the contribution.

We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

In this case, the first of the foregoing criteria was stipulated to. As to the second, there is no dispute in the evidence and the verdict should accordingly be directed. The third – the substantiality element – is not only in dispute, but the evidence is not clear as to what extent Latsis's land-based and drydock work bore on (3)(b). Therefore, we instruct the trial court to frame its instructions to the jury in light of *Wilander* and *Gizoni* and other cases and opinions above referred to, not in terms of assignment to a vessel or as requiring permanency but, rather, in terms of the employment-related connection to the Chandris fleet. The jury also should be instructed that in determining what is "substantial" in terms of the duration of Latsis's contribution to the vessel or fleet of vessels, the number and frequency of similar contributions may be taken into account. Further, the jury should also

be instructed that in determining what is "substantial" in terms of the nature of Latsis's contribution, Latsis's on-shore preparation should be taken into account, as well as the time Latsis spent in drydock in Bremerhaven, Germany consummating his contribution. Finally, the jury should also be instructed to determine whether the course of Latsis's employment regularly exposed him to the hazards of the sea. As to the proof of these matters, the putative seaman of course has the burden.

Judgment vacated, case remanded for retrial with instructions to the jury in accordance with this opinion.

Latsis v.
Chandris,
Inc.
No. 93-7704

MAR 24 1994

UNITED STATES COURT OF
APPEALS SECOND CIRCUIT
FILED: MAR 24 1994
GEORGE LANGE III, CLERK

KEARSE, *Circuit Judge*, dissenting:

I respectfully dissent.

Though I agree that the four criteria articulated by the majority *ante* at 31-32 should govern the determination of whether an employee is a "seaman" within the meaning of the Jones Act, even under that formulation I am unpersuaded that the non-dry-dock part of the district court's instructions, to which Latsis made no objection, constituted "plain" error. Further, I am unpersuaded

that the district judge erred in instructing the jury that, in determining whether plaintiff Latsis was a seaman, it should disregard the period during which the *Galileo* was in dry dock. The Jones Act concept of " 'seaman' " contains a "land-based/sea-based distinction." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 354 (1991). The $65 million-dollar dry-dock conversion and reconstruction of the *Galileo* was unquestionably a land-based activity. In my view, this part of the instructions – the only part to which Latsis objected – was correct.

Accordingly, since in my view the only portion of the instructions to which Latsis objected was not erroneous, and since the remainder of the instructions did not constitute plain error, I would affirm.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIOS LATSIS, Plaintiff, -against- CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD., Defendants.	91 **CIVIL** 6900 (LAP) **JUDGMENT** **U.S. DISTRICT COURT** **S.D. OF N.Y.** **(Filed Jun. 17, 1993)**

A Jury Trial before the Honorable LORETTA A. PRESKA, United States District Judge, having begun on June 8, 1993, during the trial the Court having reserved decision of defendants' motion to dismiss, thereafter the trial having continued, and at the conclusion of the trial the jury having answered the attached "Verdict Form," and the jury in so doing having returned a verdict in favor of defendants, and the Court directing the complaint be dismissed, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in its entirety.

DATED: NEW YORK, NEW YORK
June 14, 1993

JAMES M. PARKISON
Clerk
By: /s/ _____
Ronald A. Church
Deputy Clerk

APPROVED:
/s/ _____
Loretta A. Preska
U.S.D.J.

VERDICT FORM

1. Was Antonios Latsis a "seaman"?
   Yes _____ No X

If the answer to question number 1 is yes, continue on.

2. Were the defendants negligent in their treatment of plaintiff?
   Yes _____ No _____

If the answer to question number 2 is yes, continue on.

3. Was the defendants' negligence the proximate cause of plaintiff's injury?
   Yes _____ No _____

If the answer to question number 3 is yes, continue on.

4. If you have responded yes to all above questions then you must determine what damages, if any, plaintiff is entitled to.

   a. Compensation for lost earnings.
      Amount _____
   b. Compensation for past pain and suffering.
      Amount _____
   c. Compensation for future pain and suffering.
      Amount _____

5. Was plaintiff contributorily negligent in causing the injury?
   Yes _____ No _____

If the answer to question number 5 is yes, continue on.

6. Was plaintiff's negligence the proximate cause of his injury?
   Yes _____ No _____

If the answer to questions number 5 and 6 is yes, then answer question number 7. If the answer to either question number 5 or question number 6 is no, then return the verdict form.

7. What percentage of the entire injury was a result of plaintiff's contributory negligence?
   Percentage _____

8. Reduce the total amount of damages (4a+4b+4c) by the percentage of contributory negligence of plaintiff found in answer to question 7.

Verdict for plaintiff in the sum of $_____.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS SECOND CIRCUIT
FILED: May 24 1994
GEORGE LANGE, III, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ___ day of May on thousand nine hundred and ninety four

---

Antonios Latsis,

Plaintiff-Appellant,

-v-

Chandris, Inc., Chandris, S.A., Trans Oceanic Shipping Co., Ltd.,

Defendants-Appellees.

DOCKET NUMBER 93-7704

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Appellees Chandris, Inc., Chandris, S.A. and Trans Oceanic Shipping Co., Ltd.**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ _____
Carolyn Clark Campbell
Chief Deputy Clerk

93-7704

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

ANTONIOS LATSIS,

Plaintiff-Appellant,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPT FROM JOINT APPENDIX A303-A305 – JURY CHARGE

Now let's talk a bit about the specific claims that are presented here.

The plaintiff, Antonios Latsis, brings this action against the defendants under the Jones Act. The Jones Act provides in substance that every employer whose employees are members of the crew of a vessel in navigation shall be liable in damages for injuries sustained by the employee as a result, in whole or in part, of the negligence of any of the employer's officers, agents or employees or from any defect or deficiency, due to its negligence, in the vessel, its crew or its equipment.

Before you find the the [sic] defendants liable to plaintiff under the Jones Act, the plaintiff must prove by a preponderance of the evidence four elements:

First, that the plaintiff was a member of the crew of a vessel, acting in the course of his employment; that is, that he was a seaman; two, that the defendants were, or one of them, were plaintiff's employer; three, that the defendants or an officer, employee or agent of one of them was negligent; and four, that such negligence played a part, no matter how slight, in bringing about the injury to the plaintiff.

Now, as to element number one, that is, that plaintiff was a seaman, regarding this first element, you may find that plaintiff was a seaman if you find by a preponderance of the evidence two things:

First, that plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation. You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers.

The second thing required in proving seaman status is that plaintiff prove by a preponderance of the evidence that the capacity in which he was employed or the duties he performed contributed to the function of the vessel or the accomplishment of the vessels' mission or to the operation or maintenance of the vessels during their

movements or while at anchor for the vessels' future trips.

The parties have agreed that the work of the plaintiff aboard these ships was a contribution to the functioning of the vessel and assisted in the accomplishment of its various missions.

So the parties have agreed that the second element involved in proving seaman status has been met.

In considering whether plaintiff has otherwise proved seaman status you should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer.

If you find by a preponderance of the evidence that plaintiff was indeed a seaman, then you will go on to consider the other elements of the Jones Act claim.

93-7704

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

ANTONIOS LATSIS,

Plaintiff-Appellant,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and
TRANS OCEANIC SHIPPING CO., LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

EXCERPT FROM JOINT APPENDIX A316 – VERDICT

THE CLERK: Has the jury reached a verdict?

FOREPERSON: Yes, we have.

THE CLERK: Mr. Searcy, please rise. Question 1. Was Antonios Latsis a seaman? What is your answers? [sic]

FOREPERSON: No.

THE CLERK: Be seated. Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. Question 1. Was Antonios Latsis a seaman? Your answer: No.

THE COURT: Does anyone wish the jury to be polled?

MR. ROSENBERG: Yes, your Honor, I request the jury be polled.

THE CLERK: Ladies and gentlemen of the jury, you have heard your verdict as it stands recorded:

> Question 1. Was Antonios Latsis a seaman? Your answer: No. Is that your verdict?
>
> (Jury polled)

THE CLERK: Jury polled; verdict unanimous.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANSOCEANIC SHIPPING CO., LTD.,

Defendants.
----------X

91 Civ. 6900 (LMM)

AMENDED ANSWER

TO: SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX
Attorneys for Plaintiff
ANTONIOS LATSIS
225 Broadway, Suite 1115
New York, NY 10007
Attn: Lewis Rosenberg, Esq.

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD. (incorrectly sued herein as "TRANSOCEANIC SHIPPING CO., LTD.") by their attorneys, Poles, Tublin, Patestides & Stratakis, as and for their answer to the amended complaint herein, allege upon information and belief as follows:

1.) Deny the allegations contained in paragraph FIRST of the Amended Complaint herein.

2.) Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND of the Amended Complaint.

3.) Admit the allegations contained in paragraph THIRD of the Amended Complaint.

4.) Admit the allegations contained in paragraph FOURTH of the Amended Complaint.

5.) Admit the allegations contained in paragraph FIFTH of the Amended Complaint.

6.) Admit the allegations contained in paragraph SIXTH of the Amended Complaint.

7.) Admit that, at all material times, CHANDRIS, S.A. transacted business in the State of New York through its agent CHANDRIS, INC., and, except as so admitted, deny the allegations contained in paragraph SEVENTH of the Amended Complaint.

8.) Admit that, at all material times, FOURTH TRANSOCEANIC SHIPPING CO., LTD., transacted business in the State of New York through CHANDRIS, INC., and, except as so admitted, deny the allegations contained in paragraph EIGHTH of the Amended Complaint.

9.) Admit that CHANDRIS, INC. previously maintained an office and place of business in New York at 900 Third Avenue, New York, New York and that said office was recently moved to 950 Third Avenue, New York, New York, and, except as so admitted, deny the allegations contained in paragraph NINTH of the Amended Complaint.

10.) Deny the allegations contained in paragraph TENTH of the Amended Complaint.

11.) Deny the allegations contained in paragraph ELEVENTH of the Amended Complaint.

12.) Admit that defendant FOURTH TRANSOCEANIC SHIPPING CO., LTD., was, at all material times, the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

13.) Admit that in January of 1989, the plaintiff ANTONIO LATSIS, entered the employment of the defendant CHANDRIS, INC., acting as a principal, to provide maritime engineering consulting services from their offices, and that in the course of such employment he did attend aboard the vessel S/S GALILEO in or about May, 1989 and, except as so admitted, deny the allegations contained in paragraph THIRTEENTH of the Amended Complaint.

14.) Admit that in May, 1989 the plaintiff boarded the vessel S/S GALILEO in his capacity as an employee of CHANDRIS, INC. for a voyage from Baltimore, Maryland to the isle of Bermuda and, except as so admitted, deny the allegations contained in paragraph FOURTEENTH of the Amended Complaint.

15.) Admit that in May, 1989, the defendant CHANDRIS, S.A., in its capacity as the vessel's manager, was employing a physician to provide medical services to those aboard the S/S GALILEO and, except as so admitted, deny the allegations contained in paragraph FIFTEENTH of the Amended Complaint.

16.) Admit the allegations contained in paragraph SIXTEENTH of the Amended Complaint.

17.) Admit the allegations contained in paragraph SEVENTEENTH of the Amended Complaint.

18.) Deny the allegations contained in paragraph EIGHTEENTH of the Amended Complaint.

19.) Deny the allegations contained in paragraph NINETEENTH of the Amended Complaint.

20.) Deny the allegations contained in paragraph TWENTIETH of the Amended Complaint.

21.) Deny the allegations contained in paragraph TWENTY-FIRST of the Amended Complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

22.) Plaintiff's injuries, if any, were solely caused and/or aggravated by his own negligence, and, therefore, the defendants are not liable.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

23.) Plaintiff failed to mitigate his damages and, therefore, defendants are not liable.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

24.) Defendants exercised reasonable care in hiring the physician serving aboard the S/S GALILEO who treated the plaintiff and, therefore, defendants are not liable.

WHEREFORE, defendants pray that plaintiff's Amended Complaint be dismissed in all respects and that this Court grant them the costs and disbursements of the

action as well as such other and further relief as it may deem necessary and proper.

Dated: New York, New York
April 7, 1992

POLES, TUBLIN, PATESTIDES
& STRATAKIS
Attorneys for Defendants

By: /s/ _____
William J. Brady, III
(5965)
A Member of the Firm
46 Trinity Place
New York, New York 10006
(212) 943-0110

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

Defendants.

----------X

AMENDED COMPLAINT
91 CIV. 6900 (LMM)

PLAINTIFF REQUESTS A TRIAL BY JURY

ANTONIOS LATSIS, by his attorneys, SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX, complaining of the defendant CHANDRIS, INC. upon information and belief, alleges as follows:

FIRST: This action arises under Section 33 of the Merchant Marine Act of 1920, 46 U.S.C. Section 688, as hereinafter more fully appears.

SECOND: At all times hereinafter mentioned, plaintiff, ANTONIOS LATSIS, resided at 9 Robert Crisfield Place, City of Rye, State of New York.

THIRD: At all times hereinafter mentioned, defendant, CHANDRIS, INC. was and remains a domestic corporation duly organized and existing under the laws of the State of New York.

FOURTH: At all times hereinafter mentioned, defendant, CHANDRIS, S.A. was and remains a foreign corporation.

FIFTH: At all times hereinafter mentioned, defendant, TRANS OCEANIC SHIPPING CO., LTD., was and remains a foreign corporation.

SIXTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., transacted business in the State of New York.

SEVENTH: At all times hereinafter mentioned, defendant, CHANDRIS, S.A., transacted business in the State of New York either directly for TRANS OCEANIC SHIPPING CO., LTD. or through its agent, CHANDRIS, INC.

EIGHTH: At all times hereinafter mentioned, defendant, TRANS OCEANIC SHIPPING CO., LTD., transacted business in the State of New York either directly for CHANDRIS, S.A. or through its agent, CHANDRIS, INC.

NINTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., maintained an office of business at 900 Third Avenue, City and State of New York.

TENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, INC., was the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

ELEVENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, S.A., was the owner of the cruise ship S/S GALILEO and used it in the transportation of

passengers for hire by water in interstate and foreign commerce.

TWELFTH: At all times hereinafter mentioned, the defendant, TRANS OCEANIC SHIPPING CO., LTD., was the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

THIRTEENTH: During the first part of January, 1989, plaintiff, ANTONIOS LATSIS, entered the employment of the defendant, CHANDRIS, INC., acting as principal or manager or agent for defendants, CHANDRIS, S.A. and/or TRANS OCEANIC SHIPPING CO., LTD., as a "seaman", engaged to provide maritime engineering consulting services while on board the aforementioned vessel.

FOURTEENTH: On or about May 12, 1989, plaintiff, ANTONIOS LATSIS, boarded the defendants' vessel, S/S GALILEO, in his capacity as maritime engineering consultant for a voyage from Baltimore, Maryland to the isle of Bermuda.

FIFTEENTH: At all times hereinafter mentioned, the defendants provided to its seamen and others a physician(s) to perform necessary and proper functions pertaining to diagnosing and treating diseases and pathological conditions of the human body.

SIXTEENTH: On or about May 14, 1989, said vessel was approximately two (2) days out of port of Baltimore, Maryland and was being navigated by the master and crew.

SEVENTEENTH: On or about May 14, 1989, plaintiff sought the professional care of the defendants' physician(s) for the medical complaints from which he was suffering.

EIGHTEENTH: The aforesaid medical care, diagnosis, treatment and services were rendered carelessly, unskillfully and negligently and not in accord with accepted standards for medical care in the community.

NINETEENTH: That such negligence and malpractice was committed by the defendants' physician(s) in the scope of his/her employment of the defendants.

TWENTIETH: As a result of defendants' negligence, plaintiff was directed to remain on board of said vessel for a period of two (2) days without the required prompt and proper medical and surgical attendance. During said time, plaintiff was suffering great physical and mental pain and was in need of immediate medical and surgical attendance, but defendant negligently failed to furnish plaintiff with such medical aid and attention or to transport him to an available health facility nearby.

TWENTY-FIRST: By reason of the aforementioned failure and negligence on the part of the defendants, plaintiff's injuries were greatly enhanced, aggravated and extended and he has thereby sustained permanent and incurable injury.

WHEREFORE, plaintiff, ANTONIOS LATSIS, demands judgment against defendants, in the sum of ONE MILLION DOLLARS ($1,000,000.00), together with the costs and disbursements of this action.

Plaintiff further requests a trial by jury on all issues of fact stated herein.

Dated: New York, New York
March 12, 1992

SHAPIRO, SHIFF, BEILLY,
ROSENBERG & FOX
By: /s/ _____
LEWIS ROSENBERG
(LR-5791)
Attorney for Plaintiff
ANTONIOS LATSIS
225 Broadway – Suite 1115
New York, New York 10007
(212) 267-9020

46 U.S.C. § 688 (1994)

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred-

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(As amended Dec. 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955.)

33 U.S.C. § 902 (1994)

§ 902. Definitions

When used in this chapter –

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include-

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) the term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

SUPREME COURT, U.S.
FILED
SEP 20 1994
OFFICE OF THE CLERK

No. 94-325

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

-against-

ANTONIOS LATSIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX
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QUESTION PRESENTED

Did the Court of Appeals commit error, in concluding that Respondent engineer may be considered a seaman under the Jones Act, by following the dictates set out in this Court's latest decisions on point, rather than outdated decisions of another circuit, where the record shows that Petitioners, shipowners, stipulated that Respondent's work contributed to the function of their vessels and assisted in the accomplishment of its mission, and where after he sustained injury at sea, both the Captain and the ship's Doctor declared Respondent to be a member of the crew?

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No. 94-325

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

-against-

ANTONIOS LATSIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of the Respondent, a maritime engineer, in opposition to Petitioners' request that a Writ of Certiorari issue to review the decision of United States Court of Appeals for the Second Circuit, dated March 24, 1994. The decision of the court below vacated a judgment of the District Court, and remanded for retrial a case arising under the Jones Act for personal injury, including loss of sight, sustained by Respondent while working aboard Petitioners' ship on voyage to Bermuda from Baltimore, Maryland.

OPINION BELOW

The opinion of the Court of Appeals is reported at 20 F.3d 45 and is reproduced at Appendix A-1, to the Petition. An Order denying the Petition for Rehearing, unreported, is set out at Appendix A-37 to the Petition and the unreported Judgment of the District Court is set out at Appendix A-34 to the Petition.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals denying Petitioners' request for rehearing was issued on March 24, 1994, and the Petition for Writ of Certiorari was filed on August 19, 1994. Jurisdiction of this Court is sought to be invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. §688

"[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . , and in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

STATEMENT OF THE CASE

In their Petition for a Writ of Certiorari, rather than presenting the factual background upon which the Court of Appeals considered the applicability of the Jones Act, in conformity with the dictates of Rule 14.1. (G) requiring " . . . a *concise* statement of the case containing facts material to the consideration of the questions presented . . . " Petitioners merely recite a "*P*rocedural *H*istory".

Since this is perceived as the functional equivalent to a misstatement of the facts, the Facts as set forth in the carefully reasoned opinion of the Court of Appeals, are set forth herewith:

I. BACKGROUND

A. Antonios Latsis brought this action under the Jones Act for compensatory damages for personal injuries sustained by Latsis culminating in the loss of sight to his right eye. These injuries allegedly resulted from the negligence of the ship's doctor who failed to treat promptly Latsis' detached retina. Latsis alleges that he sustained these injuries while employed as a "seaman" aboard a cruise ship then known as the S.S. Galileo, one of a fleet of cruise ships owned and operated by appellees Chandris, Inc., Chandris S.A., and Trans Oceanic Shipping Co., Ltd., (hereinafter "Chandris").

The injuries are said to have resulted from medical malpractice by the ship's doctor on May 14, 1989, a Sunday on which the Galileo took on passengers at Baltimore,

Maryland, for a regularly-scheduled, round trip cruise of five days to Bermuda. Around noon of that Sunday, while the vessel was still in port, Latsis, on board and assigned to the Galileo in his capacity as a supervising engineer for Chandris, began experiencing a central visual disturbance which seemed to originate in the bottom portion of his eye. As the day progressed the obstruction to his vision expanded. Latsis did not appreciate the significance of the problem until the time approached to sail in the late afternoon, when he sought medical guidance from an on board nurse who advised him to see the ship's doctor at once. He did so as the ship pulled from the dock in the port of Baltimore. Once in the ship hospital, he consulted Dr. Gonzalez, the physician employed by Chandris for this vessel. Dr. Gonzalez looked at Latsis's eye though an ophthalmoscope and said it appeared to him to be a detached retina. Gonzalez recommended that Latsis relax until he could see an eye specialist when they arrived two days later in Bermuda. Latsis received no further medical care until after the ship arrived in Bermuda, and no attempt was made to transport him ashore for prompt medical care by means of a pilot vessel, helicopter, or otherwise. During this interval, the impairment of his vision continued to intensify until all central vision in the eye was lost.

The malpractice allegations relate to the fact that Dr. Gonzalez, unlicensed in any

state in the United States, neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that " . . . any patient with a suspected or established retinal detachment should be seen on an emergency basis by an ophthalmologist." When the vessel reached Bermuda, a doctor diagnosed his eye as having a massive detachment of the retina. The doctor recommended immediate hospitalization. After a consultation with Latsis's regular eye doctor in New York and another New York eye specialist, the doctors recommended surgical reattachment of the retina. Although Latsis underwent surgery, the end result was that he lost 75 percent of his central vision and can only see light on the sides of his right eye.

At the time Latsis presented himself for treatment in Bermuda, he was given a Chandris form signed by the ship's captain, chief purser, and Dr. Gonzalez, requesting medical attention be provided to Latsis for his "detected [sic, detached] retina" and describing Latsis as a "crew member" holding the "position" of "supt. engineer".

Evidence in the case indicated that Latsis, a naturalized American citizen of Greek ancestry, has had a lifelong involvement with the sea and shipping beginning with his entry into the Merchant Marine as a cadet in Germany following his graduation from high school, his sailing aboard a merchant ship as a second mate following successful completion of his studies and examinations, and finally with his being

appointed captain of a small Mediterranean vessel. Thereafter, he became chief mate on a larger vessel. He came to the United States in 1967 and promptly became a United States citizen. He was employed in San Francisco with a firm of ship surveyors while continuing his education at the University of California at Berkeley. In 1973 he was awarded a Bachelor's Degree of Science and Mechanical Engineering from Berkeley and a year later received a Master's Degree in Naval Architecture, working in the Maritime Industry during this time for the Pacific Marine Association in the ports of San Francisco and Oakland. After graduation he went to New York to work for the American Bureau of Shipping and later for Southern Star Shipping Company as a superintendent and engineer. He supervised Southern Star's vessels' operations and maintenance for 11 years before becoming employed in 1989 by Chandris out of its Miami, Florida office.

Chandris operated a large fleet of merchant vessels, five of which sailed from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico. For the first three months, Latsis was employed as a consultant and thereafter became a salaried employee. His duties were not confined to any single vessel but ran to the whole fleet. Latsis's duties included not only overseeing the vessels' engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore. While he necessarily familiarized himself

with all of the vessels' power plants and engineering functions, he attended several hands-on repairs in a supervising capacity and monitored problems that the ships had or could develop. He was particularly in charge of the electronic equipment, both retrofit and existing equipment.

Latsis's work required him to travel with various ships in the fleet from time to time. The evidence here was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent. Latsis maintained his family and residence in Rye, New York, although the company provided him with housing and the use of a rental care in Miami because his office work was regularly there. The vessel on which he was sailing and with which he had more connection than any other vessel in the fleet was the 27-year-old S.S. Galileo, as it was then known, aboard which he had sailed from Miami to Mexico with specialists from Germany to plan for a conversion and upgrading scheduled to take place in Germany in the following year. He helped draw specifications to keep the older ship in repair while sailing on its cruise routes to Mexico and Nassau in the Bahamas. In fact, he had been on board the Galileo at the conclusion of a regular two-day cruise originating from and returning to Baltimore, having joined the ship there on Friday, March 12, two days before the scheduled trip to Bermuda during which his eye injury occurred as above stated. On the Baltimore-

Bermuda trip, Latsis was responsible for escorting various ship-yard personnel around the ship in connection with the upcoming conversion of the vessel. In fact, he was busy with these people after he first noticed the problem with the vision in his right eye at about noon on Sunday, May 14, up until the time of sailing when he finally went to see the ship's nurse who sent him to Dr. Gonzalez.

According to Demetrius Kaparis, who was a senior vice president of Chandris, Inc. and head of its technical department and technical operations before it was taken over by Celebrity Cruises, Inc., Latsis was hired on a regular basis as a superintendent/engineer with the specific work of supervising the electronic systems of their ships and also upgrading the computerized systems and the computerized communication between the ships and the Chandris Miami office. The company had five superintendent/engineers, two in Miami and three in Greece, and all of the engineering department of the ships and masters of the ships reported to Kaparis for technical matters. The Chandris vessels, depending upon size, carried between 12 and 14 licensed engineers on board, and Kaparis supervised six vessels, all passenger cruising ships customarily calling in at New York, Boston, Philadelphia, Baltimore, Charleston, Wilmington, Miami and San Juan. Usually, a vessel would be in home port about every seven days. Occasionally, depending on her itinerary, the ship would return to home port after a 2 or 5 day cruise. Vessels were usually in home port between 9 and 14 hours. Each ship had a superintendent/engineer, completely responsible, who

reported to Kaparis directly. No vessels were assigned to Latsis "because he was taking care of the electronic systems of the ships," in other words, the whole fleet. Latsis reported to Kaparis.

Following Latsis's surgery and recuperation, lasting approximately six weeks, during which he received full pay, he resumed his duties in July, 1989, in Miami, and on September 30 sailed with the Galileo to Bremerhaven, Germany, where the vessel was placed in drydock. The conversion of the vessel was a $65 million job during the course of which the vessel's bottom plates and propeller were removed, the conversion being completed in March, 1990, and the vessel being renamed the Meridian. Latsis, who had been with the vessel the entire time it was in drydock in Bremerhaven, sailed back to the United States aboard the Meridian and continued to work for Chandris until November, 1990, at which time his employment with Chandris terminated. Suit was filed in October, 1991. The district court had subject matter jurisdiction under 28 U.S.C. §1331 (1988), and 46 U.S.C.App. §688 (1988). *Chandris, Inc., Chandris, S.A., and Fourth Transoceanic Shipping Co. Ltd. v. Latsis,* 20 F. 3d 45, 47-49 (2d Cir. 1994).

Following the close of the foregoing evidence, the Petitioners stipulated that the duties performed by Respondent aboard their ships contributed to the function of the vessels and the accomplishment of their mission, or to the operation or maintenance of the vessels during their movement, or while at anchor for the vessels future trips. *Id.* 20 F.3d at 49.

REASON FOR DENYING THE WRIT

The Petition fails to satisfy criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. The court below properly adhered to both the letter and spirit of the Statute (the Jones Act) as most recently construed by this Court in *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337 (1991) and *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81 (1991). These authorities are relatively new and the court below obviously was diligently proceeding to conform its ruling to the newly fashioned standards set forth by this Court. Further, the facts in this proceeding are sufficiently unique that their precedential value is likely to be of little value. Finally the Petition presents no broad question of general importance, and on that basis as well, the writ should be denied. *NLRB v. Pittsburgh SS Co.,* 340 U.S. 498, 502 (1951).

The Courts of Appeal for the First and Third Circuits have, likewise, very recently sought to bring their definition of "Seaman" into conformity with this Courts above cited authorities as well. The Third Circuit has acknowledged the decision here sought to be overturned. *Reeves v. Mobile Dredging & Pumping, Co., Inc.,* 26 F.3d 1247 (3d Cir. 1994)[1]; *LeBlanc v. BGT Corp,* 992 F.2d 394, 398 (1st Cir. 1993) (court acknowledged that *Wilander* forecloses a mechanical approach when defining status related issues

[1] In *Reeves,* the court did not adopt the Fifth Circuit's test in *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959), but rather, considered the question of seaman status under both pre and post *Wilander* analysis. The court there stated:

under maritime law). Revisiting these issues at this juncture, before other courts have been given the opportunity to evolve their law is, therefore, premature.[2] Moreover, the central theme of this Court's cited pronouncements was to tailor the Seaman's protections to those who regularly confront the hazards of the sea[3]. The court below here, faithfully followed that theme.

THE DECISION OF THE COURT OF APPEALS IS PROPER

The Merchant Marine Act of 1920, more commonly referred to as the Jones Act, was expressly enacted in 1920 by Congress to overrule this Court's 1903 decision in *The Osceola*[4]. The Act removed the previous bar under

> "We acknowledge that our test is somewhat dated, and informed by more recent Supreme Court procedure, we now set forth to modify its course." *Id.* 26 F.3d at 1250.

[2] Petitioners have cited no circuit court decision issued after this Court's decisions in *Wilander* and *Gizoni,* other than the decision of the court below, which takes a definitive position as to the "seaman" test, thus further illustrating that the question raised is premature.

[3] "All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. See generally Robertson, A New Approach To Determining Seaman Status, 64 Texas L. REV. 79 (1985). It is not the employees particular job that is determinative, but the employee's connection to a vessel." *Wilander,* 498 U.S. at 354.

[4] In *The Osceola,* this Court held that seamen possessed only general maritime rights to maintenance and cure, and that they

general maritime law for an action based upon negligence and afforded a "seaman" the same rights of tort recovery as other victims. *See Wilander, supra, citing* G. Gilmore & C. Black, the Law of Admiralty, 328-329 (2d ed. 1975.). 46 U.S.C. §688 states in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . . , and in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." (emphasis provided)

Because Congress' enactment of the Jones Act comprised a newly created bundle of rights for seamen, this Court has thus recognized that the statute should be liberally construed by the judiciary to accomplish the beneficent purposes for which it was intended. *Cosmopolitan Shipping Company v. McAllister,* 337 U.S. 783, 790 (1949); *see also Evans v. United Arab Shipping Company, S.A.G.,* 4 F.3d 207 (3d Cir. 1993).

The Jones Act incorporates by reference, legal principles which are applicable under the Federal Employers' Liability Act, (F.E.L.A.), and therefore, a seaman has a right of recovery for the negligence of his employer, its agents or its employees. *DeZon v. American President Lines, Ltd.,* 318 U.S. 660 (1943),[5] *citing Panama Railroad*

---

had no legal right to recover against the shipowner for its negligence. *Id.* 189 U.S. at 175.

[5] In *DeZon, supra,* a case substantially similar to the case at bar, Justice Jackson explicitly held that a shipowner is strictly and vicariously liable for the acts of its ship's physician. *Id.* 318 U.S. at 668-669. In the review of the various trades included as

Company v. Johnson, 264 U.S. 375 (1924); *see also The Arizona v. Anelich,* 298 U.S. 110 (1936).

The issue of "seaman" status as it is to be properly defined under the Jones Act has been a most confusing area of maritime law. See Robertson, The Law of Seaman Status Clarified, 23 J. Mar. L. & Com. 1 (1992). This perplexing issue was most recently revisited by this Court in the *Wilander* case. In that case, Justice O'Connor, after undertaking a comprehensive review of the case law which had developed prior and subsequent to the enactment of the Jones Act, came to the conclusion that the determination of an individual's status as a "seaman" is necessarily a mixed question of law and fact. *Wilander, supra,* 498 U.S. at 356. This Court there recognized the two (2) step process which requires the court to initially define the term "seaman" under the appropriate legal standard, and then request the jury to determine whether the proper legal standard has been satisfied by the facts of the case before it. *Id.* 498 U.S. at 356.

The case at bar was the first occasion that the United States Court of Appeals for the Second Circuit had to consider the proper test for "seaman" status following this Court's decisions in *Wilander* and *Gizoni. Latsis, supra,* 20 F.3d at 46.[6]

"seaman" set out in *Wilander,* Justice O'Connor cited with approval historical references dating to the mid-nineteenth century explicitly including engineers. *Id.* 498 U.S. at 343-344.

[6] The question of whether an individual qualifies as a "seaman" under the Jones Act has been articulated in the context of the voyage, since traditionally "seamen" were hired on by ship owners for single voyages. *See Folse v. Weston Atlas International, Inc.,* 593 So.2d 341 (La. 1992).

While this Court in *Wilander* did not explicitly define the extent of the connection that an employee must have with a vessel to be accorded "seaman" status, a "necessary element" was that "a seaman performed the work of a vessel", and that 'an employees duties must contribute to the function of the vessel or to the accomplishment of its mission' captures well an important element of "seaman" status'. *Id.* 498 U.S. at 354. This requirement certainly was complied with here via the Petitioners' stipulation:

> "That plaintiff's capacity and duties performed 'contributed to the function of the vessel or the accomplishment of the vessels' mission or to the operation or maintenance of the vessels during their movements or while at anchor for the vessels' future trips.' " *Latsis, supra,* 20 F.3d at 49.

In many respects, the language of the *Wilander* decision in light of the *Gizoni* holding that the second element, *i.e.*, that the individual's work contributed to the function of the vessel or the accomplishment of its mission, is what is required to be entitled to "seaman" status under the Jones Act. *Folse, supra,* 593 So.2d at 344-45.

Most significantly, and as set forth above, the trial court below, in defining "seaman" status in its instruction, removed pertinent evidentiary facts from the jury's consideration and specifically directed the jury as part of the instruction, that it was not to consider any part of the Respondent's employment aboard the S/S Galileo during the time when it was in dry-dock in Germany. In fashioning this erroneous instruction, the trial judge relied exclusively upon the Ninth Circuit's decision in *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992).

In that case, the Court was faced with an extremely narrow and unrelated issue to the case before the trial court. The Circuit court there was asked only to consider whether the Jones Act applied in the first instance, *i.e.* whether the plaintiff was injured while the ship *was in navigation. McKinley, supra,* 980 F.2d at 569 ("only the first part of the *Wenzel* test needs to be addressed in this case"). There, the plaintiff's decedent was killed in a fire aboard an oil drill ship while the vessel was undergoing an extensive conversion, and had yet to receive a certificate of seaworthiness. The Court held only that because the ship was undergoing a major conversion at the time of the fire, that "the vessel was not in navigation for the purposes of the Jones Act." *Id.* 980 F.2d at 572.

The result of the insertion of this needless hurdle was held by the Court of Appeals to be in contravention of the purposes of the Jones Act and confusing to the jury. *Latsis, supra,* 20 F.3d at 55. It is submitted that once again the Court of Appeals has harmonized the past line of cases with this Court's recent precedent and has thereby achieved the objective of the Congressional purpose in enacting the Jones Act.

Further, to adopt the test set forth by the trial court would lead to results which are inconsistent with the language and intended purpose of the statute. Under the rule proposed below, if a second mate or other crew member were to be injured while at sea three (3) days after embarking upon a voyage which disabled him from further sea duty and resulted in a land reassignment for the following term of his employment, under the rule and rationale set forth below, that same individual would be barred from making a claim under the Jones Act.

By removing from the jury's consideration the six-month period when Respondent worked aboard the vessel seven days-a-week, the trial court again emphasized the temporal relationship as opposed to the intimacy of the employees connection with the vessel directed by *Wilander. Latsis, supra,* 20 F.3d at 55-56.

In sum, the trial court's instruction to the jury concerning Respondent's entitlement to "seaman" status was erroneous and in derogation of a specific purpose and underlying policy of the Jones Act. The remedy provided by the Court of Appeals here furnished both parties with an understandable standard upon which a jury could be cogently instructed and by which a fair determination may be made as to Respondent's eligibility for "seaman" status, and a fair chance for a remedy for the loss of sight occasioned by the neglect of the Petitioners' ship's doctor. Further, the unique factual pattern here is unlikely to provide much precedential value and sufficient time has not passed since the decisions in *Wilander* and *Gizoni* to permit many of the Courts to consider their full import.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Dated: September 20, 1994

Respectfully submitted,

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(4)

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

No. 94-325

In The

Supreme Court of the United States

October Term 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed August 22, 1994
Certiorari Granted October 17, 1994

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251 pp

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THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIOS LATSIS,
Plaintiff,

v.

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,
Defendants.
_____/

Case No.
91-CV-6900

RELEVANT DOCKET ENTRIES

10/16/91	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $ 120 RECEIPT # 46437 (md) [Entry date 10/21/91]
3/17/92	4	AMENDED COMPLAINT by Antonios Latsis, (Answer due 3/27/92 for Chandris, Inc.) amending [1-1] complaint against Trans Oceanic Shippi; Summons issued. (do) [Entry date 03/20/92]
6/2/93	18	ANSWER to Complaint by Chandris, Inc. (Attorney William J. Brady III),; by attorney William J. Brady III for defendant Chandris, Inc. (ys) [Entry date 06/03/93]
6/2/93	19	AMENDED ANSWER to Complaint by Chandris, Inc., Trans Oceanic Shippi : amends [18-1] answer (ys) [Entry date 06/03/93]

6/11/93 – Jury trial conccluded on 6/11/93. Judge's Decision Reserved 6/10/93 on Defts Motion to dismiss. Jury Verdict: in favor of the defts. Cmplt is dismissed (mk)

6/17/93 20 JUDGMENT # for Chandris, Inc., Trans Oceanic Shipping Co., Ltd. against Antonios Latsis . . . that the complaint is dismissed in its entirety. (signed by JAMES PARKISON, CLERK, USDC); Mailed copies and notice of right to appeal. EOD: 6/17/93 (sc)

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

ANTONIOS LATSIS,
Plaintiff-Appellant,

v.

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,
Defendants-Appellees.
_____/

Docket No.
93-7704

RELEVANT DOCKET ENTRIES

3/24/94 Judgment VACATED & CASE REMANDED FOR RETRIAL WITH INSTRUCTIONS TO THE JURY IN ACCORDANCE WITH THIS OPINION, by published signed opinion filed per Judge Oakes. (ono)

3/24/94 Judge Kearse DISSENTING in a separate opinion filed. (ono)

3/24/94 Judgment filed. (ono)

5/24/94 Order FILED DENYING petition for REHEARING and suggestion for rehearing in banc [506831-1] by Appellee Trans Oceanic, Chandris, S.A., Chandris, Inc. [506831-2] (onc)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC.,

Defendant.

_____X

COMPLAINT

PLAINTIFF REQUESTS A TRIAL BY JURY

ANTONIOS LATSIS, by his attorneys, SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX, complaining of the defendant CHANDRIS, INC. upon information and belief, alleges as follows:

FIRST: This action arises under Section 33 of the Merchant Marine Act of 1920, 46 U.S.C. Section 688, as hereinafter more fully appears.

SECOND: At all times hereinafter mentioned, plaintiff, ANTONIOS LATSIS, resided at 9 Robert Crisfield Place, City of Rye, State of New York.

THIRD: At all times hereinafter mentioned, defendant, CHANDRIS, INC. is and remains a domestic corporation duly organized and existing under the laws of the State of New York.

FOURTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC. is and remains a foreign corporation licensed and authorized to do business in the State of New York.

FIFTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., transacted business in the State of New York.

SIXTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC. maintained an office of business at 900 Third Avenue, City and State of New York.

SEVENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, INC., was the owner of the cruiseship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

EIGHTH: During the first part of January, 1989, plaintiff, ANTONIOS LATSIS, entered the employment of the defendant as a "seaman", engaged to provide maritime engineering consulting services while on board the aforementioned vessel.

NINTH: On or about May 12, 1989, plaintiff, ANTONIOS LATSIS, boarded the defendant's vessel, S/S GALILEO, in his capacity as maritime engineering consultant for a voyage from Baltimore, Maryland to the isle of Bermuda.

TENTH: At all times hereinafter mentioned, the defendant provided to its seamen and others a physician(s) to perform necessary and proper functions pertaining to diagnosing and treating diseases and pathological conditions of the human body.

ELEVENTH: On or about May 14, 1989, said vessel was approximately two (2) days out of port of Baltimore, Maryland and was being navigated by the master and crew.

TWELFTH: On or about May 14, 1989, plaintiff sought the professional care of the defendant's physician(s) for the medical complaints from which he was suffering.

THIRTEENTH: The aforesaid medical care, diagnosis, treatment and services were rendered carelessly, unskillfully and negligently and not in accord with accepted standards for medical care in the community.

FOURTEENTH: That such negligence and malpractice was committed by the defendant's physician(s) in the scope of his/her employment of the defendant, CHANDRIS, INC.

FIFTEENTH: As a result of defendant's negligence, plaintiff was directed to remain on board of said vessel for period of two (2) days without the required prompt and proper medical and surgical attendance. During said time, plaintiff was suffering great physical and mental pain and was in need of immediate medical and surgical attendance, but defendant negligently failed to furnish plaintiff with such medical aid and attention or to transport him to an available health facility nearby.

SIXTEENTH: By reason of the aforementioned failure and negligence on the part of the defendant, plaintiff's injuries were greatly enhanced, aggravated and extended and he has thereby sustained permanent and incurable injury.

WHEREFORE, plaintiff, ANTONIOS LATSIS, demands judgment against defendant, CHANDRIS, INC., in the sum of ONE MILLION DOLLARS ($1,000,000.00), together with the costs and disbursements of this action.

Plaintiff further requests a trial by jury on all issues of fact stated herein.

Dated: New York, New York
October 15, 1991

SHAPIRO, SHIFF, BEILLY,
ROSENBERG & FOX

By: /s/ _____
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

Defendants.

X

AMENDED COMPLAINT
91 CIV. 6900 (LMM)

PLAINTIFF REQUESTS A TRIAL BY JURY

ANTONIOS LATSIS, by his attorneys, SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX, complaining of the defendant CHANDRIS, INC. upon information and belief, alleges as follows:

FIRST: This action arises under Section 33 of the Merchant Marine Act of 1920, 46 U.S.C. Section 688, as hereinafter more fully appears.

SECOND: At all times hereinafter mentioned, plaintiff, ANTONIOS LATSIS, resided at 9 Robert Crisfield Place, City of Rye, State of New York.

THIRD: At all times hereinafter mentioned, defendant, CHANDRIS, INC. was and remains a domestic corporation duly organized and existing under the laws of the State of New York.

FOURTH: At all times hereinafter mentioned, defendant, CHANDRIS, S.A. was and remains a foreign corporation.

FIFTH: At all times hereinafter mentioned, defendant, TRANS OCEANIC SHIPPING CO., LTD., was and remains a foreign corporation.

SIXTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., transacted business in the State of New York.

SEVENTH: At all times hereinafter mentioned, defendant, CHANDRIS, S.A., transacted business in the State of New York either directly for TRANS OCEANIC SHIPPING CO., LTD. or through its agent, CHANDRIS, INC.

EIGHTH: At all times hereinafter mentioned, defendant, TRANS OCEANIC SHIPPING CO., LTD., transacted business in the State of New York either directly for CHANDRIS, S.A. or through its agent, CHANDRIS, INC.

NINTH: At all times hereinafter mentioned, defendant, CHANDRIS, INC., maintained an office of business at 900 Third Avenue, City and State of New York.

TENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, INC., was the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

ELEVENTH: At all times hereinafter mentioned, the defendant, CHANDRIS, S.A., was the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

TWELFTH: At all times hereinafter mentioned, the defendant, TRANS OCEANIC SHIPPING CO., LTD., was the owner of the cruise ship S/S GALILEO and used it in

the transportation of passengers for hire by water in interstate and foreign commerce.

THIRTEENTH: During the first part of January, 1989, plaintiff, ANTONIOS LATSIS, entered the employment of the defendant, CHANDRIS, INC., acting as principal or manager or agent for defendants, CHANDRIS, S.A. and/or TRANS OCEANIC SHIPPING CO., LTD., as a "seaman", engaged to provide maritime engineering consulting services while on board the aforementioned vessel.

FOURTEENTH: On or about May 12, 1989, plaintiff, ANTONIOS LATSIS, boarded the defendants' vessel, S/S GALILEO, in his capacity as maritime engineering consultant for a voyage from Baltimore, Maryland to the isle of Bermuda.

FIFTEENTH: At all times hereinafter mentioned, the defendants provided to its seamen and others a physician(s) to perform necessary and proper functions pertaining to diagnosing and treating diseases and pathological conditions of the human body.

SIXTEENTH: On or about May 14, 1989, said vessel was approximately two (2) days out of port of Baltimore, Maryland and was being navigated by the master and crew.

SEVENTEENTH: On or about May 14, 1989, plaintiff sought the professional care of the defendants' physician(s) for the medical complaints from which he was suffering.

EIGHTEENTH: The aforesaid medical care, diagnosis, treatment and services were rendered carelessly,

unskillfully and negligently and not in accord with accepted standards for medical care in the community.

NINETEENTH: That such negligence and malpractice was committed by the defendants' physician(s) in the scope of his/her employment of the defendants.

TWENTIETH: As a result of defendants' negligence, plaintiff was directed to remain on board of said vessel for a period of two (2) days without the required prompt and proper medical and surgical attendance. During said time, plaintiff was suffering great physical and mental pain and was in need of immediate medical and surgical attendance, but defendant negligently failed to furnish plaintiff with such medical aid and attention or to transport him to an available health facility nearby.

TWENTY-FIRST: By reason of the aforementioned failure and negligence on the part of the defendants, plaintiff's injuries were greatly enhanced, aggravated and extended and he has thereby sustained permanent and incurable injury.

WHEREFORE, plaintiff, ANTONIOS LATSIS, demands judgment against defendants, in the sum of ONE MILLION DOLLARS ($1,000,000.00), together with the costs and disbursements of this action.

Plaintiff further requests a trial by jury on all issues of fact stated herein.

Dated: New York, New York
March 12, 1992

SHAPIRO, SHIFF, BEILLY,
ROSENBERG & FOX

By: /s/ _____
LEWIS ROSENBERG
(LR-5791)
Attorney for Plaintiff
ANTONIOS LATSIS
225 Broadway – Suite 1115
New York, New York 10007
(212) 267-9020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC.,

Defendant.

_____X

Index No. 91 Civ. 6900

ANSWER

TO: SHAPIRO, SHIFF, BEILLY,
ROSENBERG & FOX
Attorneys for Plaintiff
ANTONIOS LATSIS
225 Broadway, Suite 1115
New York, NY 10007
Attn: Lewis Rosenberg, Esq.

CHANDRIS, INC., by its attorneys, Poles, Tublin, Patestides & Stratakis, as and for its answer to the complaint herein, alleges upon information and belief as follows:

1.) Denies the allegations contained in paragraph FIRST of the Complaint herein.

2.) Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND of the Complaint herein.

3.) Admits the allegations contained in paragraph THIRD of the Complaint herein.

4.) Denies the allegations contained in paragraph FOURTH of the Complaint herein.

5.) Admits the allegations contained in paragraph FIFTH of the Complaint herein.

6.) Admits that Chandris, Inc. previously maintained an office and place of business in New York at 900 Third Avenue, New York, New York, and that said office was recently moved to 950 Third Avenue, New York, New York and, except as so admitted, denies the allegations contained in paragraph SIXTH of the Complaint herein.

7.) Denies the allegations contained in paragraph SEVENTH of the Complaint herein.

8.) Admits that in January of 1989 defendant, hired the plaintiff, Antonios Latsis, to provide maritime engineering consulting services from their offices, and that in the course of such employment he did attend aboard the vessel S/S GALILEO in or about May, 1989 and, except as so admitted, denies the allegations contained in paragraph EIGHTH of the Complaint herein.

9.) Admits that on or about May 12, 1989 the plaintiff boarded the vessel S/S GALILEO in his capacity as an employee of Chandris, Inc. for a voyage from Baltimore, Maryland to the isle of Bermuda and, except as so admitted, denies the allegations contained in paragraph NINTH of the Complaint herein.

10.) Admits that in May, 1989 the vessel's manager was employing a physician to provide medical services to those aboard the aforesaid vessel who wished to make use of his services and, except as so admitted, denies the allegations contained in paragraph TENTH of the Complaint herein.

11.) Admits the allegations contained in paragraph ELEVENTH of the Complaint herein.

12.) Denies knowledge or information sufficient for form a belief as to the truth of the allegations contained in paragraph TWELFTH of the Complaint herein.

13.) Denies the allegations contained in paragraph THIRTEENTH of the Complaint herein.

14.) Denies the allegations contained in paragraph FOURTEENTH of the Complaint herein.

15.) Denies the allegations contained in paragraph FIFTEENTH of the Complaint herein.

16.) Denies the allegations contained in paragraph SIXTEENTH of the Complaint herein.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

17.) Plaintiff's injuries, if any, were solely caused and/or aggravated by his own negligence, and, therefore, the defendant is not liable.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

23.) Plaintiff failed to mitigate his damages and, therefore, defendant is not liable.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

24.) Defendant exercised reasonable care in hiring the physician aboard the S/S GALILEO who treated the plaintiff and, therefore, defendant is not liable.

WHEREFORE, the defendant prays that plaintiff's Complaint be dismissed in all respects and that this Court grant them the costs and disbursements of the action as well as such other and further relief as it may deem necessary and proper.

Dated: New York, New York
November 26, 1991

POLES, TUBLIN, PATESTIDES
& STRATAKIS
Attorneys for Defendant

By: /s/ _____
William J. Brady, III (5965)
A Member of the Firm
46 Trinity Place
New York, New York 10006
(212) 943-0110

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____X

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

DefendantS.

_____X

91 CIV. 6900
(LMM)

AMENDED
ANSWER

TO: SHAPIRO, SHIFF, BEILLY,
ROSENBERG & FOX
Attorneys for Plaintiff
ANTONIOS LATSIS
225 Broadway, Suite 1115
New York, NY 10007
Attn: Lewis Rosenberg, Esq.

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD. (incorrectly sued herein as "TRANSOCEANIC SHIPPING CO., LTD.") by their attorneys, Poles, Tublin, Patestides & Stratakis, as and for their answer to the amended complaint herein, allege upon information and belief as follows:

1.) Deny the allegations contained in paragraph FIRST of the Amended Complaint herein.

2.) Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph SECOND of the Amended Complaint.

3.) Admit the allegations contained in paragraph THIRD of the Amended Complaint.

4.) Admit the allegations contained in paragraph FOURTH of the Amended Complaint.

5.) Admit the allegations contained in paragraph FIFTH of the Amended Complaint.

6.) Admit the allegations contained in paragraph SIXTH of the Amended Complaint.

7.) Admit that, at all material times, CHANDRIS, S.A. transacted business in the State of New York through its agent CHANDRIS, INC., and, except as so admitted, deny the allegations contained in paragraph SEVENTH of the Amended Complaint.

8.) Admit that, at all material times, FOURTH TRANSOCEANIC SHIPPING CO., LTD., transacted business in the State of New York through CHANDRIS, INC., and, except as so admitted, deny the allegations contained in paragraph EIGHTH of the Amended Complaint.

9.) Admit that CHANDRIS, INC. previously maintained an office and place of business in New York at 900 Third Avenue, New York, New York and that said office was recently moved to 950 Third Avenue, New York, New York, and, except as so admitted, deny the allegations contained in paragraph NINTH of the Amended Complaint.

10.) Deny the allegations contained in paragraph TENTH of the Amended Complaint.

11.) Deny the allegations contained in paragraph ELEVENTH of the Amended Complaint.

12.) Admit that defendant FOURTH TRANSOCEANIC SHIPPING CO., LTD., was, at all material times, the owner of the cruise ship S/S GALILEO and used it in the transportation of passengers for hire by water in interstate and foreign commerce.

13.) Admit that in January of 1989, the plaintiff ANTONIOS LATSIS, entered the employment of the defendant CHANDRIS, INC., acting as a principal, to provide maritime engineering consulting services from their offices, and that in the course of such employment he did attend aboard the vessel S/S GALILEO in or about May, 1989 and, except as so admitted, deny the allegations contained in paragraph THIRTEENTH of the Amended Complaint.

14.) Admit that in May, 1989 the plaintiff boarded the vessel S/S GALILEO in his capacity as an employee of CHANDRIS, INC. for a voyage from Baltimore, Maryland to the isle of Bermuda and, except as so admitted, deny the allegations contained in paragraph FOURTEENTH of the Amended Complaint.

15.) Admit that in May, 1989, the defendant CHANDRIS, S.A., in its capacity as the vessel's manager, was employing a physician to provide medical services to those aboard the S/S GALILEO and, except as so admitted, deny the allegations contained in paragraph FIFTEENTH of the Amended Complaint.

16.) Admit the allegations contained in paragraph SIXTEENTH of the Amended Complaint.

17.) Admit the allegations contained in paragraph SEVENTEENTH of the Amended Complaint.

18.) Deny the allegations contained in paragraph EIGHTEENTH of the Amended Complaint.

19.) Deny the allegations contained in paragraph NINETEENTH of the Amended Complaint.

20.) Deny the allegations contained in paragraph TWENTIETH of the Amended Complaint.

21.) Deny the allegations contained in paragraph TWENTY-FIRST of the Amended Complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

22.) Plaintiff's injuries, if any, were solely caused and/or aggravated by his own negligence, and, therefore, the defendants are not liable.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

23.) Plaintiff failed to mitigate his damages and, therefore, defendants are not liable.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

24.) Defendants exercised reasonable care in hiring the physician serving aboard the S/S GALILEO who treated the plaintiff and, therefore, defendants are not liable.

WHEREFORE, defendants pray that plaintiff's Amended Complaint be dismissed in all respects and that this Court grant them the costs and disbursements of the

action as well as such other and further relief as it may deem necessary and proper.

Dated: New York, New York
April 7, 1992

POLES, TUBLIN, PATESTIDES
& STRATAKIS
Attorneys for Defendants

By: /s/ _____
William J. Brady, III
(5965)
A Member of the Firm
46 Trinity Place
New York, New York 10006
(212) 943-0110

(Certificate of service omitted in printing)

*[1]
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

----------x

ANTONIO LATSIS,

Plaintiff,

v.

91 Civ. 6900 (LAP)

CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,

Defendants.

----------x

June 8, 1993
10:00 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

SHAPIRO, SHIFF, BEILLY, ROSENBERG & FOX
Attorneys for plaintiff
BY: LEWIS ROSENBERG

POLES, TUBLIN, PASTESTIDES & STRATAKIS
Attorney for defendants
BY: WILLIAM J. BRADY, III

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* Any typographical and/or incorrect punctuation found in the following Transcript of Proceedings were left intentionally to show accurately how the original documents appeared.

TRANSCRIPT OF PROCEEDINGS
TESTIMONY OF ANTONIOS LATSIS

[2] (A jury of eight was impaneled and sworn)

THE COURT: Members of the jury, as I have told you previously, it is your function in this case to decide the issues of fact. Your decision on the issues of fact is to be based solely on the evidence. Nothing I say is evidence; nothing eigher of the lawyers says is evidence.

Questions by themselves are not evidence. Objections are not evidence. Testimony which has been excluded or which you are told to disregard is not evidence. The evidence consists of the sworn testimony of witnesses and of the exhibits which will be received into evidence for your consideration.

Also, in some instances there might be facts which the lawyers agree to or facts which I instruct you that you must find.

Now, there are two kinds of evidence: Direct and circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer – or conclude – that other facts exist. I will give you further instructions on these, as well as other matters, at the end of the case, but please keep in mind that you may consider both kinds of evidence, both direct and circumstantial.

Now, how do you decide what to believe and what not to believe? Listen to the witnesses, watch them and [3] observe them, then decide whether you believe or disbelieve them in the same way that you decide such

questions in your ordinary life. Did they know what they were talking about? Were they candid, honest, open and truthful? Did they have a reason to falsify, to exaggerate, or to distort their testimony? Use your common sense and your good judgment to evaluate their testimony, based on all the circumstances.

Now, in this case, you may hear testimony by certain doctors testifying as expert witnesses. Witnesses who, by education and experience, have become expert in a science, profession or area of knowledge may express an opinion as to a relevant matter in which they profess to be expert, and they may explain their reasons for that opinion.

Now, it may seem strange to you that, as laymen, jurors are called upon to resolve a conflict among experts, but since their testimony relates to factual issues, as the sole judges of the facts, you will be called upon to resolve such conflicts. The testimony of an expert is subject to the same considerations concerning reliability, credibility and interest as the testimony of any other witness.

You should give each expert opinion such weight as you feel it deserves. Consider each expert witness' appearance and his manner of testifying. Does his opinion appear to be reasonable? Does his professional judgment impress you as sound and informed?

[4] If you decide that the opinion of an expert witness is not based upon sufficient education and experience, or that the reasons given in support of the opinion are unsound, or that the opinion is outweighed by other evidence, or that the witness is biased or untruthful, you may reject the opinion in whole or in part.

It is very important that you keep an open mind throughout this case. Do not form any judgments until the evidence is concluded and the case is submitted to you.

Now, remember that the evidence comes in step by step. First, a witness testifies on direct examination. When he or she is finished, the other side has the right to cross-examine that witness. Also, first one side presents its evidence, and then the other side has an opportunity to present evidence.

Remember that there may be two or even more sides to any story. You will not be in a position to form any judgment as to what you believe until you have heard all the evidence in the case.

I will also ask you to be sure that none of your friends or relatives are present in the courtroom without my knowledge. It's particularly important that you do not hear from them what happens during those times when the jury is not in the courtroom, and also that you do not discuss with them what happened when you were present.

[5] If at any time you see a friend or relative of yours come into the courtroom, would you be sure to send a note to me through Ms. Siwick at the first opportunity, letting me know that that's the case. The reason for this is, under our system, we have certain rules of evidence, as you know, and the lawyers may discuss certain things, whether they are to be put before you properly as the finders of fact.

If, for example, you are in the jury room and one of your spouses comes in, and we are discussing something which ultimately is not put before you for your consideration, later in the day, your spouse says to you, "What'd you think about the part where the lawyers were talking about X?" if that happens, then we might have to retry the whole case. So please be particularly careful to let me know if you see any folks you know in the courtroom.

Do not discuss the case among yourselves or with any other person. You will discuss it among yourselves only after all of the evidence is in and the case is given to you to discuss and decide in the jury room. Until then, please keep your impressions to yourself.

I do not think it is likely in this case, but please do not read anything in the newspaper or elsewhere about the case or listen to anything you hear or see on T.V. or on radio. Do not allow anyone to speak to you about the [6] case. Do not do any research or investigation on your own into the case.

Now, if you wish, you may take notes. There are pads and pencils in the jury room. If you do so, however, please leave the notes in the jury room at night, and remember that the notes are for your own personal use. They are not to be given or read to anyone else.

Now, you might come in contact with the lawyers in the hall. If they don't say hello to you, they are only doing their jobs. Our goal here is to try the case completely, fairly, without any influence one way or the other. For that reason, the lawyers will not greet you, nor should you greet them when you are in the hall. And it is

not rudeness, because they are doing so at my instruction.

Finally, a word about trial procedure. In a very short time, the lawyers will have an opportunity to make opening statements to you. As I said, these statements are not evidence. They serve no purpose other than to give you an idea in advance what evidence the lawyers expect that you will hear from the witnesses who are called. These statements permit the lawyers to tell you a little bit about what the case is about, but the only evidence will come from the witnesses and the exhibits.

After the opening statements, you will hear the testimony of the witnesses. Each witness will give direct [7] testimony, and then he or she will be cross-examined by the other side. Sometimes there's redirect and recross, as well. First, the plaintiff will present its evidence, and then the defendant will present its evidence.

After all the evidence has been received, the lawyers will have an opportunity to sum up. They may review the evidence, they may make arguments to you as to what conclusions they think you should draw or you should not draw from the evidence. Remember, again, that those summations are not evidence but only argument.

After the summations, I will instruct you on the law, and following my instructions, you will go into the jury room, review the evidence, review the exhibits which have been received in evidence and discuss the evidence among yourselves. Based on that evidence and your discussion of it, you will determine your verdict.

At the conclusion of the trial, I will tell you in detail what the plaintiff must prove in order for him to recover. For the moment, I will just say that a party with the burden of proof must prove his claim by a preponderance of the evidence. This burden of proof by a preponderance of the evidence is different from the burden imposed on the state in a criminal case where, as those of you who have served and those of you who watch television know, the government's allegations in a criminal case must be proved [8] beyond a reasonable doubt.

I will tell you more when I instruct you at the conclusion of the case concerning this burden, but at the moment I will only say that this burden means that if, after hearing all of the evidence, you believe that it is more likely than not that a certain fact occurred, then that fact has been proved to you by a preponderance of the evidence. If you believe that it is more likely than not that it did not occur, then it has not been proved to you. But, if you find that the likelihood is evenly balanced, maybe yes, maybe no, then the party having the burden of proving the fact to you has not succeeded.

Now, after a short recess in which you will go into the jury room, we will have the treat of hearing the opening statements of the lawyers.

Thank you, ladies and gentlemen. Ms. Siwick will take you into the jury room and point out the facilities to you.

(Jury leaves courtroom)

THE COURT: May I ask a question before you go out? There is not an instruction that we can find with

respect to lost wages. Is that something in the case, or not?

MR. ROSENBERG: Yes, your Honor.

THE COURT: It's in the case?

[9] MR. ROSENBERG: Yes. Well, lost income, lost income. It's not wages.

MR. BRADY: Not wages.

MR. ROSENBERG: Not wages.

THE COURT: Lost income.

MR. ROSENBERG: Income, yes. I'll prepare something –

THE COURT: Okay.

MR. ROSENBERG: – appropriate to that.

THE COURT: Why don't you look at it just so we know what we are doing.

MR. ROSENBERG: We are going to have to do something about that, your Honor, because that's quite specialized in this matter, and I think that we have our work cut out for us on that.

THE COURT: Okay.

At the outset, there is not a stipulation as to employment status?

MR. BRADY: No.

MR. ROSENBERG: Well, depends.

MR. BRADY: Depends on what you mean. He was employed.

MR. ROSENBERG: Was employed by the defendants. The order states so. But, however, his status as a seaman is at issue.

[10] MR. BRADY: That's the issue.

MR. ROSENBERG: Jones Act issue.

THE COURT: We go so far as to say that he was employed by defendants?

MR. ROSENBERG: Yes.

THE COURT: And then we have looked carefully at your jury charges on the seaman issue, and I know that I've forgotten the Fifth Circuit case, but I know that the Fifth Circuit case which you cite states something along the lines of permanently employed or substantial amount of his time.

MR. BRADY: Right.

THE COURT: And plaintiff's, I think, was much more simple.

MR. ROSENBERG: Well, we cited McDermott, but there is something I would like to bring to the Court's attention.

THE COURT: McDermott was the second part.

MR. ROSENBERG: Right, on the issue of substantial –

THE COURT: Right.

MR. ROSENBERG: – contacts kind of thing. I have a recent case from this circuit, an Eastern District, which I think –

THE COURT: Okay, let us see it. Give it to counsel.

* * *

[27] Thank you.

THE COURT: Thank you, sir.

Plaintiff will now begin putting in his case, ladies and gentlemen.

Mr. Rosenberg.

MR. ROSENBERG: Your Honor, I call the plaintiff Antonios Latsis.

ANTONIOS LATSIS,

called as a witness by the plaintiff, having been duly sworn, testified as follows:

MR. ROSENBERG: May I proceed, your Honor?

THE COURT: Yes, sir. Please do, Mr. Rosenberg.

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q. Mr. Latsis, you are the plaintiff in this action; is that correct?

A. Yes, I am.

Q. I'm going to ask you, what is your state of birth and your country of origin?

A. I was born in Athens, Greece, September 25, 1940.

Q. And can you tell us, briefly, Mr. Latsis, what was your education as a young person?

A. I finished high school and proceeded to join the Merchant Marine as a cadet in 1959 in Bremerhaven, Germany. I stayed in the Merchant Marine through my cadetship in [28] various elevated qualifications the first four years before I took the schooling and examinations by the Greek Ministry of Merchant Marine Education Department as a second mate.

Once I completed this examination successfully, I sailed as a second mate for 16 months on another company ship, again Greek Merchant Marine.

Q. What year are we talking about now, Mr. Latsis?

A. Examinations took place in 1964. I joined another ship in 1964 in September – in December, and for the next 16 months I sailed as a second mate to about end of 1966, September about.

Q. Can you just tell us briefly what the duties of a second mate were at that time?

A. A second mate on a Merchant Marine ship is in charge of navigation different towards the beginning of his experience, 8:00 to 12:00 in the morning and 8:00 to 12:00 at night, and also later, when he gets more experience 12:00 to 4:00, which are more responsible, because late at night and in port, the different functions of the ship like filling the freighter, it's a loading and discharging function.

If the vessel is a passenger ship, in the case we got a layover, passenger ship that I was with, attending the safety and discharging of the passengers, taking supplies,

checking all the equipment of the ship for navigation and so [29] on and so forth.

Q. You indicated you had taken courses as well as aboard ship; is that correct?

A. Yes.

Q. You took written examinations for the various positions until you arrived at the position of second mate?

A. Yes, sir.

Q. What was your health like in that period of time?

A. My health was in very good condition.

Q. And were you obliged to pass certain physical examinations periodically to demonstrate your fitness?

A. Yes, I was.

Q. And you had no difficulty with these examinations and you passed all of them, am I correct?

A. Certainly.

Q. Now, from the time of your – I'd like you to just chronologically move briefly, if we could, your Honor, to the period of time thereafter and confine yourself before your marriage, as best you can, okay?

Can you tell us chronologically, after your achieving second mate status, what the nature of your employment was and where it was and what you did?

A. Okay. As I said, the fist ship after my examinations, my diploma work was with a ship that went to –

traded between Greece and the Indian Ocean, countries [30] of Indonesia and Philippines, and brought pilgrams to Mecca. I did that for six months.

Then, on completion of this period, I joined a Merchant Marine ship that was worldwide, specifically in the Pacific Ocean between Japan and the West Coast of the United States and Australia; and subsequent to that, I returned to Greece, and I was offered the position of a captain in the Mediterranean vessel, for which I was qualified by virtue of the size of the ship and the area in which it was trading.

Q. And, thereupon, were you appointed the captain of a vessel?

A. I was appointed the captain of a small Mediterranean vessel.

Q. And were you the master of that vessel and overall in charge of its crew and all of the equipment –

A. Safety –

Q. – and safety?

A. – navigation, repair.

Q. And how was your health up until that period of time, Mr. Latsis?

A. It was in very good condition.

Q. And in addition to the examinations you previously had to take, you took additional examinations, am I correct?

A. Every time you join a Merchant Marine ship, you [31] have to take a physical examination.

Q. Did you have any difficulties with any function in any part of your body in passing these examinations?

A. None whatsoever.

Q. Now, how long did you remain the captain of that vessel that sailed?

A. Five months.

Q. About five months.

And what period of time were you up to now on the calendar? What date are we talking about?

A. We are up to February 1967.

Q. And in February of 1967, what was the next activity you embarked upon?

A. My next assignment was a larger ship, on which I obtained the assignment of the chief mate, again one step above my diploma. The ship was larger and I had to acquire experience in that position so I would be assigned to that when I obtained my diploma, at which time I had met my future wife, and I –

Q. Where was she living at that time?

A. She was living in Greece at the time.

Q. Was she a student in Greece at that time?

A. She was student of the Greek language and she was also teaching English.

Q. And after you met Carol, were you married in [32] Greece?

A. We were married in Greece subsequent to my second assignment on the ship as chief mate, yes.

Q. And when were you married?

A. I was married in August of 1967.

Q. And did you continue sailing after you were first married?

A. No, I did not.

Q. And what did you do at that point after your marriage in August of 1967?

A. After I was married, I completed the education, the schooling, so to speak, of the education for chief mate's license. I took an examination and passed it very successfully, and after that, we had already made the arrangements for me to immigrate to the United States, where I obtained citizenship by virtue of being married to a United States citizen, and I proceeded to do that in December of the same year.

Q. The schooling that you had for that chief mate's position, where did that take place?

A. That took place in Piraievs, Greece.

Q. And what was your health at that point in your life?

A. Again, I took another physical examinations before the award of the diploma as a part of the [33] prerequisite of passing the complete examination, education and physical, and I passed it.

Q. And you indicated to us that you immigrated to the United States in about that time in 1967, am I correct?

A. In December of 1967.

Q. And where did you and the new Mrs. Latsis move to in the United States?

A. We moved to San Francisco, California.

Q. And why did you select San Francisco?

A. Because my wife was originally from this area. She was born and raised in that area.

Q. And after arriving in the United States, how did you get to the United States?

A. I sailed, ultimately. I took a sailing assignment with a passenger ship of a company I worked for previously, and I didn't pay ticket and they didn't pay me salary, so I was able to move a large number of my belongings since I was coming as an immigrant.

Q. And after arriving in San Francisco, did you embark upon employment in the United States?

A. I certainly did. I was employed originally by Pillsbury, Martignolli & Bossermann, a surveyors firm, to do ship surveys.

Q. Let me interrupt you briefly. What is a ship survey and what does a ship surveyor do?

[34] A. A ship surveyor is called usually by claimants, either the cargo – in my case, it was cargo mostly because I was associated with a cargo – or damage to the ship or damage to the engines of the ship on some occasions that occurred during the voyage, and they want to ascertain the extent and the cause of the damage and, to some extent, make a statement, a responsible statement. And so the parties involved afterwards, they will verify that this actually occurred.

Q. And what qualified you as a marine surveyor?

A. My previous sea experience in which I was safeguarding, say in this case, the cargo from being damaged, and my years of sailing give me the experience to evaluate situations aboard the ship on which the cargo would be damaged or the ship would be damaged.

Q. And did you have the opportunity to resume your formal education after arriving in San Francisco?

A. Yes, this was –

Q. And can you tell us where that was and what the program was and when it was?

A. Yes. I originally got a job so I can, you know, support my family and myself, and also I applied for the university for the next fall since I was ahead of the spring semester and I couldn't very well get into the program.

And all the programs started the beginning of [35] school yeer, the academic year, so I applied for the September session to attend the University of California in the daytime. As a full term student, three-quarter student, they allow you to take a lighter load, maybe three courses instead of four.

Q. Was that because you were employed at the same time?

A. Because I had to support myself, yes.

Q. After your admission to that program at the University of California, which branch was that?

A. It was a branch of mechanical engineering, with the ultimate intentior. of backing a naval architect, of which a prerequisite is mechanical engineering.

Q. Was that at Berkeley?

A. University of California in Berkeley, yes.

Q. And for how long were you a three-quarter student in the fashion you described to us?

A. From 1968, fall, to the summer of 1974.

Q. Had you been awarded a diploma before that time by the university?

A. Yes. In 1973 I completed a Bachelor's of Science Degree program in mechanical engineering, and I was awarded that diploma.

Q. So it was from 19 –

A. '73.

[36] Q. 1968 to 1974 you were on this three-quarter program, essentially?

A. Yes.

Q. And you worked throughout the period, am I correct?

A. Yes, I did.

Q. And you worked in the maritime industry?

A. I worked in the maritime industry for the Pacific Maritime Association as a ship's clerk, organizing the loading of ships, preplanning and supervising the loading of vessels, mostly American vessels, in the port of San Francisco and Oakland.

Q. You indicated your objective was for a degree in naval architecture. You were awarded that in 1974, am I correct?

A. In 1974. A year later, I was admitted to the graduate school of the same university, and I completed a program of naval architecture for a naval architecture degree in a little over a year with a master's thesis included.

Q. So when was it you were awarded the Master's Degree?

A. I was awarded the Master's Degree officially for December of that year, but I completed the requirements by September of 1974.

[37] Q. Can you tell us what your health was throughout this period of your life?

A. Throughout this period, my health was good, with the exception that I started – I needed to wear glasses first, I observed, for driving. I couldn't see the signs far enough ahead. And also, attending the university, it was more strenuous work on my eyes and the distance to the board, so I observed that I needed glasses.

Q. When did you begin wearing glasses to the best of your recollection?

A. In, I would say, 1970, '69 and '70, I started wearing glasses.

Q. And from thereafter, you were wearing glasses to the present time, am I correct?

A. Yes, I have.

Q. And up until your graduation and your Master's Degree, did you have any special difficulties of your eyes other than requiring periodic eye examinations and prescriptions?

A. No. The doctor told me several times that the rest of the indications of my eye were normal.

Q. When did you come to New York and what occasioned that move to New York?

A. Upon graduation, I had been interviewed by the American Bureau of Shipping.

[38] Q. What is the American Bureau of Shipping?

A. It's a classification society, a non-profit organization that supervised, makes the rules, supervised and supervises the execution of building, classing and maintaining Merchant Marine vessels.

Q. And where was the office that employed you at that time?

A. On 20 Broad Street, downtown New York.

Q. And –

A. Manhattan.

Q. When did you move to New York?

A. I moved to New York September of 1974.

Q. And from September 1974 to the present time, have you maintained your residence in New York State?

A. I certainly have, yes.

Q. You and your wife presently reside in Rye, New York, am I correct?

A. We do.

Q. How long have you lived in Rye, New York?

A. Since 1984.

Q. And where did you live before that?

A. In Staten Island, New York.

Q. And how long a period of time did you retain this employment with the American Bureau of Ships?

A. For –

[39] Q. Shipping. Excuse me.

A. For three years and three months, approximately.

Q. Was there any travel involved in that job?

A. It was some travel, infrequent, however, to survey ships and go to shipyards, take measurements of ships while we are doing a project that concerned a vessel that was being built. I was a research engineer for that firm.

Q. I see. And you said you retained that job for three years and three months?

A. Right.

Q. And can you tell us what date we are up to now?

A. In 198 – I mean 1977, December.

Q. Did you continue with your education in any fashion during the interval following your graduation and awarding of your Master's Degree?

A. I did. I took graduate courses from the State University of New York in advanced chartering problems and marine insurance.

Q. And when you left the American Bureau of Shipping, what was your next employment?

A. My next employment was I was engaged by Southern Star Shipping Company.

Q. What's the name again?

A. Southern.

Q. Southern Star?

[40] A. Southern Star Shipping Company, Incorporated.

Q. What was the position for which you were hired by Southern Star?

A. I was hired as a superintendent engineer.

Q. And where was that work?

A. That work was based in New York at 245 Park Avenue. I was also traveling to the locations where the vessels were either carrying out operations or being repaired or being in need of my services.

Q. And were you concerned generally with the operation of those vessels?

A. The technical department is normally in support of the operations. They overlook the operations from the point of view of being carried out properly from the mechanical point of view and the functional point of view, and whenever there's a need for repair to improve

or ascertain the performance, they interfere there and carry out the repairs, plan them, negotiate them, carry them out and finish them.

Q. Did you ever have from time to time occasion to go aboard ship in the course of that employment?

A. Several times. That's what we are doing, we are going on board the ship, supervising the repairs, first of all acknowledging the problem, planning, supervising the execution of the repair, and also saying to the [41] certification society, for instance, in this case, A.B.S., that the ship was in good repair in the periodical surveyor status.

Q. And is it required that maritime vessels be periodically inspected and certified concerning their seaworthiness?

A. Absolutely, sir, yes.

Q. Did you have a role to play with respect to that company's ships in that regard?

A. I did.

Q. And did you have occasion to observe their performance and sail with them in order to do so?

A. I did so at all times. Very frequently, I would say. In fact, one of my first assignments with the company was to see an overheating problem in the main engine of one of the vessels. And I went out to sea with the ship, and I was a specialist in that particular engine to see where the problem was coming from.

Q. And was this during the course of a regular voyage of the ship, scheduled voyage?

A. Yes.

Q. Was that a passenger ship?

A. That was a freighter.

Q. Freighter?

A. It sailed from New Orleans to Houston. It was a [42] short voyage, so it was convenient and economical for this specialist that we retained.

Q. For how long a period of time were you employed by Southern Star?

A. I was employed from 19 – I started January, took two weeks vacation, started in January of 1978, and I stayed employed by them until the end of February of 1988. 11 years, about.

Q. Excuse me?

A. 11 years, about.

Q. And in that period of time, how was your health?

A. My health was, except for the corrective lenses that I had to wear, it was in excellent condition.

Q. When did you become the patient of Dr. Thomas Materna?

A. I believe it was in 1982 or '83. I'm not – I haven't reviewed the record. I think it was '83.

Q. And can you tell us with what frequency you would see Dr. Materna from the time you became his patient in '82 or '83, whenever it was, until the period

under consideration of February or March of 1989, how often would you see him?

A. The frequency was every year he would send me a card and remind me, unless I was feeling that I needed correction in my sight more frequently, which it did not [43] happen.

Q. And as a result of these visits to Dr. Materna during that interval in time of about six years or seven years or thereabouts, did he continue to prescribe different types of lenses for you on occasion?

A. Yes, he gave me a thorough, you know, eye examination, he anesthesized my eye, he looked for a variety of things that I'm not qualified, actually, to know, but he just keep noticing that things were normal, and then he will examine me for vision on the chart, and when I needed corrections, he would give me the correction to the lenses I was wearing at the time.

Q. Did he diagnose any condition with respect to your eye other than the need for lenses and in being nearsighted?

A. No, sir.

Q. Into this period of time did you have any special knowledge about the eye, how it functioned, or what difficulties they might be prone to or conditions?

A. Not with regard to injuries or other malfunctions except the shortsightedness.

Q. You know what that was from your own experience, I take it?

A. Yes.

Glaucoma. I might add Glaucoma I knew because he [44] was taking Glaucoma measurements. But I still don't know how it manifests itself.

Q. During the course of the normal examination, he would test your eyes for Glaucoma?

A. Glaucoma.

Q. Did he indicate you had no Glaucoma, that your eyes were normal in that respect?

A. Yes.

Q. Had you ever experienced any difficulties with your vision other than what you have described to us?

A. No, sir.

Q. Now, we've taken you up to about the period of February or March of 1988 in your career, and can you tell us at that point in time what your next employment was?

A. At that time, the company that I was working for, it was experiencing, Southern Star Shipping, specifically, was experiencing financial difficulties, as was the entire shipping industry, and they could not, you know, they could not keep the engineering department in New York as being very expensive work space, and they asked me to either move to Greece where they have another office or that – and later they could not keep me any longer under the same circumstances.

So I proceeded to receive a small severance pay, and they gave me a lot of recommendation letters and all of

[45] this and I became available for employment. And Mr. Kaparis, Chandris, Incorporated, interviewed me to offer me employment in their firm.

Q. What was the nature of that employment that was offered?

A. The nature of that employment was to assist Mr. Kaparis because the company was embarking into a substantial improvement program of their other fleet, and also they were anticipating ordering a new ship at the time, which they eventually did. And since I had new building experience with Southern Star, building ships in Japan, they knew of me very well and they offered me this employment to add to their personnel, to their technical personnel.

Q. When you were first employed by Chandris, did they have a fleet? Did the Chandris companies have a fleet of merchant vessels?

A. They have a fleet of merchant vessels, five of which were operating in the U.S. ports, from the U.S. ports to the Caribbean, New York to Bermuda, and Miami and the intermediate ports to the Caribbean Islands, and also from Puerto Rico to the Caribbean Islands.

Q. And did the work that was contemplated in this employment require you to attend the vessels themselves, be on board during voyages and trips?

A. Yes. The job description was, at least as I [46] understood it when I joined them, that it would be taking all of the reports aboard the ships from the engineers, because they were visiting ports very frequently, as passenger ships do, and go and observe the problems that

they were experiencing or anticipating the problems, if measurements were low or, you know, very close preventative maintenance as well.

And then we will come ashore, plan the – make a plan of attack, so to speak, what are the people that would help the slip, what materials were needed, and will either join the ships ourselves with the specialist or make sure that at the next port the specialist went on board, it was smoothly started, and let the ship sail on its own until the next port, which was most of the times five or seven days. This is a maximum length this ship went out by itself.

Q. And when you first embarked on employment with the Chandris companies, what was the financial arrangement?

A. The financial arrangement at the beginning was to go to them on consulting basis from September of 1989 – '88, sorry, 1988, for three months.

Q. Was this sort of a testing period for both you and for them?

A. It was, yes. I objected to moving from New York to Miami, to relocating my family without knowing the nature of the work and the – not the nature of the work so much [47] per se, the nature of the whole overall future of my assignment with Chandris, and Chandris wanted to see how I would fit into their other personnel that they had in position at the time.

Q. So did you embark upon this employment, on this experimental, if I can call it experimental, or tentative basis?

A. Yes, trial basis, trial basis, and we call it consulting for purposes of financial arrangements.

Q. In other words, you were not a salaried employee during that period of time?

A. I was not a salaried employee. I was not insured medically, and I did not have the benefits of the company offered, such as retirement fund.

Q. So you were not a permanent employee of the company?

A. I was not.

Q. And that was clearly understood by both you and the Chandris people when you first embarked on this work, am I correct?

A. Yes.

Q. And during that, you worked those three months, I take it, correct?

A. I worked those three months.

Q. And you carried out your assignments, am I [48] correct?

A. Correct.

Q. And can you describe to the jury what the nature of those assignments were during that period of time?

A. Okay.

Q. Generally, of course.

A. Generally was to visit all the ships that they were sailing in the vicinity of the United States, that is,

Puerto Rico and Mainland United States, and become familiar with their machinery, with all the equipment on board, all their functions, the sequence of events, how you have blank time to carry out repairs or not, and also I attended a dry docking in the Port of Norfold of the Amerikanis, one of the vessels.

Q. Amerikanis is one of the vessels?

A. One of the vessels trading the U.S. water. And subsequent to that, I took a cruise – "cruise" is a misnomer – actually, working cruise, with a specialist from Germany that they were planning the Galileo, they were taking the specifications of the machinery to plan the Galileo conversion. It went from Miami to Mexico and returned.

Q. The Galileo is one of that fleet as well, am I correct?

A. It is.

[49] Q. And can you just briefly describe the Galileo and she existed in that period of time and what was contemplated with respect to modifications, if any.

A. Yes. The Galileo at the time was a 27-year-old Italian-built liner that she had reached – she was originally built for immigrants from Italy to Australia, and she was reaching a certain age that all her equipment, cabins and plumbing, main engines were coming of an age, that they were no longer practical to be maintained in that fashion because the passengers demanded better ships, better services.

So they were planning a major refurbishment from the accomodation, from the hotel, as it is called in the

industry, which is cabins, saloons, public spaces, dining room, to the major engines, the major engineering functions, such as increase the conditioning, sewage system, bow thrusters, propellers, general overhaul and extensions.

So that was a very major modification, a very expensive one, and the Chandris decided to preplan it ahead of time at least one year, and that's where I came into the picture.

Q. And did you study this vessel by traveling on board, as well as at the office looking at drawings and specifications?

A. That is correct, sir. I took the drawings, I [50] visited the vessel in every opportunity she came to port. I spent as much time as I could on board in port. And when we engaged the different companies to come and give us quotations, I traveled with them on board the ships. I helped them write the specifications.

I was liaison between the engineering staff that wasn't very familiar with conversions, but they were more familiar than me with the actual running of the engines, and the people that were proposing to do the modifications.

Q. Were you called upon from time to time to give advice concerning required repairs in the interval before the conversion as the ship traveled?

A. Absolutely, all the time. I was called in to, when they were experiencing minor problems – for instance, sometimes they have three boilers is one instance, and there were two operating at all times. When one of them

was experiencing difficulty, how the prepare the next one, what type of repairs they could do temporarily until we went to the conversion and made the repairs, and things of the nature.

Air conditioning units were acting up. Again, they were getting old. Electrical problems were appearing from time to time. There were overloads. We converted to 220, that was usually in Europe, to 110 that the American passengers required for their services, and all the [51] machinery that they were using from the U.S. manufacturers and things of this nature.

The electronic equipment was being upgraded because radars and anti-collision devices were required with the new regulations, safety of life at sea requirements. It was a continuous operating and keeping up the ship to date and planning the major modifications that would be more thoroughly converted.

Q. And what was the typical itinerary of the Galileo in that period of time?

A. The Galileo, she was sailing from Miami to Mexico to the West Coast of Mexico – to the East Coast of Mexico, I'm sorry, and in the five-day cruises and two-day cruises to the Nassau, Bahamas on the weekend, Friday to Sunday in the wintertime.

And in the summertime, in the early spring, she will start repositioning herself with seven-day cruises. For instance, Charleston, one cruise, as she was going up to the Caribbean, and then up to Baltimore, Philadelphia, and eventually, in the full season, at the end of May she

was in New York, having itinerary of New York to Bermuda and back, five-day and two days to sometimes to nowhere, or seven days to Bermuda.

Q. Where were you living with respect to that employment in the three-month trial period?

[52] A. My basic residence was in Rye, New York. However, I was spending enough time in the Miami office because that's where all the files, all the drawings of the ships were, and that's where the technical offices headquarters were, and I had – Chandris, when I was consultant, they maintained the hotel room for me, suite, actually. It is a little bit more like an apartment.

And eventually, when I was permanently employed by them in January, they we made an arrangement to have a trial period for my residence in Miami, and they paid part of my rent in an apartment.

Q. We got to January of 1989. In January of 1989, did the arrangements which were the temporary up until that time solidify to something more permanent –

A. Yes, there was.

Q. – between you and Chandris?

And can you tell us what the financial arrangements were beginning in January? Do you know approximately when it was, mid January, beginning of January?

A. It was in the middle of January.

Q. Okay. So from say January 14 or 15 or thereabouts, your relationship with the company in terms of –

THE COURT: Mr. Rosenberg, what was the change?

[53] Q. Tell us what that was.

A. Okay. In the middle of my – to start it properly, the middle of my consulting, they all agreed that we were all suited for each other, we could work together very well, and they started proposing. And by middle of January, we had confirmed my remuneration, my benefits under which I would join the company as an assistant to Mr. Kaparis in the engineering department, which was the number two position in engineering.

Q. And was this, in terms of the financial arrangement, characterized in an annual salary?

A. It was an annual salary paid bi-weekly, 26 times a year, a leased car of 400-some, 95 dollars I think it was, part of the apartment fee that they would pay towards whatever apartment I rented for the following year, and a pension plan to which I would become vested in five years, and they would pay the major portion and I would pay up to 5 percent of my income towards it – they would match it by double – and full medical coverage, full medical insurance for myself and my family, although my family was not living in Miami at the time.

Q. And what was annualizing the salary, what was the salary fixed at?

A. We started with 65,000, plus the benefits I told you, and also all the travel expenses, entertainment [54] expenses. Several times I had to take technicians and several people out to dinner, or whatever that entailed, whatever expenses incurred. Also, travel expenses were

extra, and my living expenses during travel outside of the Miami office.

Q. And for how long a period of time were you retained as a salaried employee of Chandris?

A. From middle January of 1989 to the third week of November of 1990.

Q. And by the time 1990 had rolled around, had the annual salary been altered in any way?

A. Yes.

Q. What was the annual salary in 1990?

A. In 1990, the salary by the end of year, because they also paid an extra salary at the end of the year, 13th salary, so to speak, as a bonus overall, it was 75,600, I believe.

Q. Was there a value associated to the fringe benefits that you received for the company?

A. Yes, my benefits were the car was about 5,000, I estimated; the medical insurance about $7500; the retirement fund compensation, about $7500; and then, of course, to that, in comparison to my present situation, I estimated the value of vacation time, paid vacation time, and sick leave.

Q. How much was that?

[55] A. I would say one month's worth of benefits, which was $6,250 based on 75,000. And –

Q. Did you receive entertainment expenses?

A. Well, entertainment expenses did not count because it was just reimbursed. But there was some small attached to that.

Q. What was that value?

A. I would say about 3,000 a year.

Q. And what was the total annual compensation package would you say Chandris employment had employed you at?

A. Estimated at that time about 105 – approximately 105,000 with the benefits.

Q. In the period of time that you were employed by Chandris, from January of 1989 to November of 1990, that's approximately – that's less than two years. In weeks, how many weeks would that be about?

A. About 98 weeks.

Q. 98 weeks. I'd like to ask you, with respect to your duties and whereabouts they would take place on a weekly basis, if you were to estimate in that 90-some-odd weeks of employment, how many of those weeks would be aboard ship and how many of those weeks would be –

A. I estimated about 65 weeks out of the 98, but I'm taking out of this also the 6 weeks of compensation for my [56] eye.

Q. So you weren't working in that period of time?

A. I wasn't working in that period.

Q. You were paid, of course?

A. I was paid, of course.

Q. But in terms of your activities, employment activities, that was employment?

A. Yes. So deduct that from the actual active duty weeks that I was employed by Chandris, and that comes to about 65 weeks, which amounts to 72 percent of my time.

Q. And now let's get to the point where the voyage of May 14 –

MR. ROSENBERG: If your Honor please, can you give us some indication as to when we might be breaking for luncheon recess? I want to logically stop at some point in this.

THE COURT: Tell me, please, what your estimate is of the time for the testimony relating to the voyage at issue?

MR. ROSENBERG: Well, the voyage in issue and the subsequent care will probably be 40 minutes to an hour, I would say.

THE COURT: Okay, why don't we break now. We will take an hour, ladies and gentlemen. Would you be kind enough to come back at 1:30?

[57] Remember, please, do not discuss the case among yourselves while you are out. And would you make every attempt to be as prompt as possible so we can get as much work done each day as we can.

Thank you. Enjoy your lunch. Come back before the rain.

(Jury leaves courtroom)

THE COURT: One question, gentlemen, if I might, on what we were talking about before, on the issue of the definition of a seaman and how we discuss the employment issue.

Now, Mr. Brady, I looked at the Fifth Circuit case that you note in your instructions, and, Mr. Rosenberg, I think that the instructions that you put in were a little too brief. Mr. Rosenberg has handed me Judge Glasser's case in this Buchalotto against the City of New York.

MR. BRADY: I haven't had a chance to read that yet.

THE COURT: Why don't I give it to you.

MR. ROSENBERG: I gave him a copy.

MR. BRADY: I have a copy, but I haven't had a chance to look at it.

THE COURT: Tomorrow morning could we discuss this a little further? Because, for obvious reasons, I think it's very important and I don't think that either one [58] of the proposed charges you folks have put in is exactly on point. So maybe if we could all look at the same case and be on the same wave length, we could talk a bit before the jury comes in tomorrow morning.

MR. ROSENBERG: All right.

MR. BRADY: Thank you.

THE COURT: Thank you very much. Enjoy your lunch.

(Luncheon recess)

[59] AFTERNOON SESSION

1:30 p.m.

(In open court; jury not present)

MR. ROSENBERG: When I complete, Mr. Latsis's testimony, I intend to read the deposition transcript of Dr. Gonzalez. I had considered, subject to the Court's permission, having my associate sit in the witness chair, and I will read the question, he will read the answer to make it a little more easier flow.

THE COURT: Any problem with that Mr. Brady?

MR. BRADY: No, your Honor.

THE COURT: Sure.

Is Dr. Gonzalez going to appear?

MR. BRADY: Yes. I'm expecting him, your Honor.

MR. ROSENBERG: He's taking an examination now, apparently.

THE COURT: The question is, do you need to read it?

MR. ROSENBERG: Only use his testimony as a foundation for questions for my expert, who will be here tomorrow.

THE COURT: All right, but we won't go over the same material again. And if you have to read, you have to read, but we are not going to do it again Thursday.

MR. ROSENBERG: He's going to be calling him. [60] I'm not calling him.

THE COURT: All right.

MR. ROSENBERG: I plan on cross-examining him.

THE COURT: No doubt.
Okay, are we ready to go?

MR. ROSENBERG: Vigorously.

THE COURT: Bring them in.

(Jury enters courtroom)

THE COURT: Good afternoon.

THE COURT: Mr. Latsis, would you resume the stand, sir, please.

ANTONIOS LATSIS, Resumed

THE COURT: Mr. Rosenberg, let's go.

DIRECT EXAMINATIOI, CONTD.

BY MR. ROSENBERG:

Q. Mr. Latsis, I would like to call your attention now to the period in time immediately preceding May 14, 1989, and in connection with your employment, where were you located at that time?

A. I was still located in Miami and my family was still in New York.

Q. And in connection with your duties for Chandris, what were you doing on that particular day, that Sunday, May 14?

A. We had just returned from a two-day cruise to [61] Nowhere out of Baltimore.

Q. Excuse me for a moment. You had been on a boat for, the ship for the previous –

A. I had been on board a ship for the previous two days, and the day before we arrived from Miami to Baltimore. We joined the ship on Friday, the 12th, with shipyards and technicians from different subcontractors that we were going to participate or propose to participate in the conversion, and we were showing them the ship, the ship's machinery, layout, interfacing it with the officers, as I said before, the engineering officers and deck officers for the function of different parts that they were going to be converting, taking specifications and so on and so forth, taking specific specifications.

And then on Sunday, we arrived back in the morning in Baltimore, and during the course of the day we were discharging passengers, taking passengers for a five-day cruise to Bermuda, which would be Sunday to the following Friday.

Q. And what were your duties to be during that five-day interval?

A. During the five-day interval, we had received on board during Sunday the other, another team, a group of shipyards and technicians that would be doing the same thing, they would be exposed to the ship's machinery, [62] layout, verify different parts of the specifications that we had given them to quote. Very extensive.

Q. Was it a regularly scheduled cruise?

A. Regularly scheduled cruise with passengers.

Q. This was the Galileo?

A. This is the S/S Galileo.

Q. The S/S Galileo. Can you describe to us the morning of May 14, what you did that morning, what kind of things you embarked upon?

A. Well, we discussed with the team that was going out, the teams, the meeting, and we discussed all their questions. If they had any more questions, any more information we had to send them either by mail or drawings, whatever, in a general meeting with Mr. Kaparis and the ship's chief engineer and other representatives, and we kind of helped them out on the ship. And we had a little break in between, and after that, the people from the next team arrived and we start working on board, started showing them the corridors and what we were going to be doing in the next two days.

Q. Mr. Kaparis was with you at that time?

A. Mr. Kaparis was leading the team, yes, of the Chandris technical department.

Q. With respect to the hierarchy of the technical department that you were employed by, how did Mr. Kaparis [63] fit in?

A. He was the head of the technical department.

Q. Who did you report to?

A. I reported to him.

Q. Can you tell us whether or not at some time during the course of that day you experienced any problems with your eye, with your eyes?

A. Around noontime, to the best of my recollection, I started seeing like a tear at the bottom part of my eye, and I was rubbing it and trying to see if there was something that, you know, I could remove. And, you know, as I was moving my eye, it looked like it was moving a little bit, but it didn't. But it was clear. I could see through it. It it was in the center.

And as the day progressed, I became more annoyed because this seemed to stay there and, if anything, expand a little bit. We were in the middle of sessions with the incoming teams and so on and so forth, and in the afternoon I noticed that it was getting a little hazy, a little fuzzy and more centeralized to the eye. So I began to worry that this was nothing that could be removed easily, but again not enough to think that I would alert the whole ship and say I have to go and so on and so forth.

And by the time we sailed, I had more free time, as the ship was sailing, to concentrate on myself, and I [64] seek advice immediately by a nurse that I happened to see on the deck. And I said, well, what do you think I should do, is it something that can be seen, and she said, no, but I would advise you, of course, to see the doctor right away.

And I did just that.

Q. Who was the doctor that you went to see right away?

A. Dr. Gonzalez.

Q. Where was the ship in terms of its progress at the time you first encountered Dr. Gonzalez?

A. She had pulled out of the dock.

Q. And –

A. In the port.

Q. Excuse me.

a. The Port of Baltimore, I was going to say.

Q. And who was Dr. Gonzalez?

A. Dr. Gonzalez was the ship's physician in charge of the hospital, taking care of all passengers and crew –

Q. And –

A. – ailments.

Q. Ship's hospital was a facility on board the ship?

A. There's a facility on board the ship. Was even then hospital with a three rooms, I believe.

Q. Three rooms?

A. Yes.

[65] Q. And do you know approximately what time it would have been when you saw Dr. Gonzalez?

A. To the best of my recollection, about 4:30.

Q. And when you saw Dr. Gonzalez, what, if anything, did you report to him concerning your problem?

A. I described to him the problem as it manifested itself, like it started out as a tear at the bottom of my eye, I didn't worry, I was hoping it would go away or, as I relax, you know, something will, you know, shift to one side and so on, and further down the line timewise, about sailing time, it began to get wider and more fuzzy so my

vision through it could not be as good as it was when it first started or when it first appeared, yeah.

Q. Had you ever experienced anything like that before?

A. I never had.

Q. Did you have any idea what it was?

A. No idea.

Q. Now, when you went to see Dr. Gonzalez, the first thing you did was you present this problem to him?

A. I presented the problem to him. I described the problem to him.

Q. As you just described it to us?

A. Exactly.

Q. What, if anything, did he say in response to [66] that, or do?

A. Well, immediately he said, he asked me to lay down on the examining table, and he proceeded to look at my eye with an instrument that has a light in it. You called it an ophthalmoscope, but I didn't know what it was called at the time.

Q. And how long did this take place? How long did it take him to do this?

A. About two, three minutes he observed, he observed the other eye a little bit, and he told me he can't see anything.

Q. Did he ask to test your vision?

A. No, he did not, sir.

Q. And after reporting to you that he couldn't find anything, what, if anything else, transpired?

A. Well, he thought for a couple of minutes, and then he said, it looks to me that it could be a detached retina, so we have to remove that possibility, so I will recommend that you see a doctor when we arrive in Bermuda.

Q. Did you know what a detached retina was at that time?

A. I had no idea, sir.

Q. Had you ever been –

A. No, I wasn't.

Q. – acquainted with that term?

[67] A. Never heard that term in my life before.

Q. Did he indicate to you if there was any urgency associated with this visit to the doctor, the doctor in Bermuda?

A. He said, I will do that, I will advise that, and just take it easy. And I told him, as you know, I believe he knew of me and he knew of may role in the company, so I didn't have to do any strenuous manual work, just explaining the drawings and the specifications to the different people and we were examining logs and the ship's behavior. So he said, that's it, that I will make sure that you will see the doctor in Bermuda.

Q. Did he indicate what kind of doctor he was recommending you to see in Bermuda?

THE COURT: Counsel. Counsel, this is direct.

MR. ROSENBERG: Yes.

THE COURT: I know you know how to ask a direct question on direct. Try again, please.

Q. With reference to the doctor in Bermuda, was there anything else stated about the nature of his specialty or what he should do?

A. He will request from the agent, he said, an ophthalmologist. An eye specialist, excuse me.

Q. Were you given any other or further advice by Dr. Gonzalez?

[68] A. No, sir.

Q. Were you familiar with the course of travel that that ship was traveling at that time?

A. The course?

THE COURT: Where was the ship going?

Q. Right, destination.

A. The destination was Bermuda, and the ship had to go through the river about ten, eleven hours of sailing time before she went out to the open sea.

Q. And was there a pilot on board?

A. There was a pilot on board for taking out of the dock and a pilot for the river.

Q. And can you tell us what, if any, role the pilot played and how long it lasted?

A. Well, the first part is of very short duration. They both board the ship when she's alongside for ease of boarding. The technique is to take it away from the dock and line her up with the channel down the river, and then he disembarks right away with a tug boat, through the tug boat, and the other pilot takes over and assists the master of the ship to navigate through the river and narrows until she's out in the open sea. Before she's in the open sea, he disembarks the pilot boat.

Q. Pilot boat?

A. Yes.

[69] Q. Does that boat dock alongside the ship?

A. Comes alongside the ship while the ship is still moving just enough to keep course, and he disembarks and then the ship can continue on her own voyage.

Q. If it was desirable, could you disembark that way?

A. Definitely.

Q. You say it took 11 hours to get to sea through the Chesapeake Bay?

A. Chesapeake Bay, correct.

Q. Could you tell us approximately what time it was before you got out to sea?

A. About 3:30 in the morning, roughly.

Q. Did Dr. Gonzalez contact you at any time before the ship went out to sea?

A. He did not.

Q. Did he give you any advice except what you advised us after you first saw him?

A. No, he did not.

Q. Did he indicate there was any urgency associated with your visit to an ophthalmologist.

MR. BRADY: Objection.

THE COURT: We've already done this, not to mention it is direct.

Q. Now, Mr. Latsis, for the balance of the voyage [70] can you describe your activities to us, please?

A. Well, the first night we we had mostly, you know, welcoming the people, setting the ground rules, showing them a little bit the ship and had dinner. And because of my eye, I didn't feel very comfortable, so I withdrew at the earliest possible convenient time after dinner. And the next day my eye felt I could see better and the problem was improving.

Q. That was when?

A. That was Monday morning about 8 o'clock.

Q. When you got up?

A. When – well, got up and started preparing for this day's work.

Q. And what were your activities on that day?

A. On that day, we followed the same routine we had followed before. We had a meeting in one room to start the teams out to the various parts of the ship to take the data, and I was given one team that I took through

the machinery, the air conditioning and certain structures of the ships to define the specifications more clearly to them.

Q. And what was the state of your vision on that day after you got up and –

A. For the first half of the day, it started getting a little fuzzy again, but not very fast. By noon time, I started having a blockage of the center part of the eye, but [71] more persistent and darkening.

Q. At any time during this day did Dr. Gonzalez make contact with you?

A. No, he did not.

Q. And can you tell us what the nature of your activities were in the afternoon and evening of that day?

A. The afternoon, we continued after lunch with the same team, and we had a couple of meetings for consultations, question and answer sessions, and in the evening I had dinner and I withdrew again because I knew the eye was getting worse and I had blockage of the center of the eye at that time. I could see peripherally, but not to read or anything, just to see light and things that were happening. And I went to bed as early as I could.

Q. And on Tuesday morning?

A. On Tuesday morning, I woke up again about the same time because there was not an early arrival, and I knew that they had already notified the agent in Bermuda for me to go to the eye doctor. So –

Q. How was that communicated to you?

A. By the chief purser, the chief purser. The captain acknowledged that – one of the times the captain joined us at the dinner table and he says, I understand you have some problem with your eye, and I said, yes, in fact I think it's getting worse, and he said the specialist will [72] take a look at it and see what needs to be done. And we left it at that because I had no idea what it was and to what extent it was serious.

Q. And the ship arrived on Tuesday?

A. The ship arrived on Tuesday. About 11 o'clock she docked.

Q. 11:00 a.m.?

A. 11:00 a.m., yes.

Q. Did Dr. Gonzalez contact you at any time before the ship arrived on Tuesday?

A. He did not.

Q. And can you tell us what activities you pursued upon the arrival of the ship?

A. I went to the captain's office where the agent usually comes after boarding, and I reminded him that I need to go to the doctor as quickly as possible. Because by that time I had worries that this had to be attended perhaps very quickly. But again, I didn't know what it was.

Q. How did you come to that conclusion, that it required attention quickly?

A. Well, because my vision was getting poorer and poorer. By that time it was again – it had gone a step

further than the previous day as far as the morning recovery. It wasn't recovering almost completely, it was persisting in the center.

[73] Q. Did Dr. Gonzalez make any contact before you left the ship that day?

A. No, he did not.

Q. What disposition was made with regard to the meeting with the doctor?

A. The agent asked me to wait for a few minutes to half an hour that it would take to finish the formalities with the captain – he had to sign certain arrival papers – that he would personally take me to the doctor.

Q. Which is this agent your speaking of? Is that a company representative?

A. Yes, Mayor. No, he's an assigned agent for the ship course on the Island of Bermuda. The name of the agency is called Mayer something incorporated or limited, and the specific gentleman was a Captain Moore, who was the usual man. He's in charge of ship operations. And he visited the vessel and took me to the doctor.

Q. Did you get to the doctor's office by that means?

A. By the agent's car.

Q. And what time, approximately, was it that you got to the doctor's office?

A. I think we arrived back in Hamilton, which is about an hour and a half drive, about 1 o'clock, 1:15 or something.

Q. And who was the doctor? What was his name?

[74] A. Dr. Hamza.

Q. Do you know how to spell that?

A. H-a-m-z-a.

Q. And describe to us what transpired at Dr. Hamza's office?

A. Dr. Hamza –

Q. First heating.

A. – had already been warned by Captain Moore that he's dropping a patient to his office and he gave me an immediate appointment.

He asked me to describe my problem. I did, and he immediately became very serious because it sounded to him definitely that it was a detached retina. But again, he was very methodical, as it proved later, and he said I have to give you some eye drops to anesthetize the eye and dilate the pupil so you can see it clearly with a specific instrument that he used.

So he put these drops in my eye and asked me to wait in the waiting room for about 20 minutes, after which he looked at the eye and he was even more serious, and he says, you have a massive detachment of retina. It's caused like a ballooning effect.

Q. And what happened next?

A. He says, you cannot go back to the ship, you have to go immediately to the hospital, lay down on your back, [75] and I have to operate as soon as I can.

Of course, my state of mind at the time was terrible because I had no idea what was expecting me and that I had to be operated on. I asked him if I could fly back to the states, which I would have preferred, and he says, I don't advise it because the pressure of the airplane can worsen the detachment.

THE COURT: Mr. Latsis, would you be kind enough to listen to counsel's question and respond only to his question, please?

THE WITNESS: Yes, ma'am.

THE COURT: Thank you.

Q. Mr. Latsis, after this examination you have described to us, were you given any advice concerning hospital admission?

A. Yes, he called the hospital, Hamza, called an agent, he notified that he will put me in the hospital at least for the interim, and he was, as things were standing at the time, he planned to operate the next day.

Q. Was there any communication with home or with New York?

A. Not at that moment. I was asked if I'm going to go to the ship to pick up my things with the assistance, which I did, and I called home when I got to the hospital before I laid in bed.

[76] Q. This advice to lay down flat on your back, had that been given to you at any time before Dr. Hamza advised you of that?

A. No, sir.

Q. Was there any contact with Dr. Materna?

A. I seeked Dr. Materna's advice also from the hospital, but he was not in his office. But I gave him all the numbers, and also I told my wife on the phone to make sure that she communicated with him and explain to him the whole situation, gave him Dr. Hamza's telephone numbers so they can have a conference and see if that was the best course of action that was being advised to do.

Q. As far as you know, was such a conference undertaken between Dr. Hamza and Dr. Materna?

A. I didn't find out until the next morning early, when I called my wife again and she says, yes, she had contacted Dr. Materna. He would contact Dr. Hamza and he was contacting another specialist for detachment in New York to have a conference.

Q. With respect to the care that was undertaken on the following day at the hospital, this is the hospital in Bermuda, am I correct?

A. Correct.

Q. When were you admitted to the hospital?

A. I arrived at the hospital about 4:00 to 5:00 in [77] the afternoon, I believe.

Q. On that first day?

A. On the 16th, I think it was, two days later.

Q. And was there a procedure undertaken –

A. No.

Q. – at the hospital?

A. Just that he had to follow the instruction of the doctors immediately after checking in, taking the name and all that, to lay in bed and make sure that I wouldn't turn during the night, and I wasn't given anything to eat because the procedure was scheduled for next morning.

Q. And did you have a discussion with Dr. Hamza about the nature of the procedure?

A. He told me that he would complete procedure which I had to go through for him to operate on my eye and reattach the retina.

Q. Did he describe how it would be undertaken?

A. Very vague.

Q. What steps?

A. In very vague terms. He says it's a usual procedure, that's all.

MR. ROSENBERG: If your Honor please, I would like to present the witness with exhibit 5, if I might.

THE COURT: Any objection, Mr. Brady?

MR. BRADY: No, your Honor.

[78] THE COURT: Please do so.

Do I have the originals here?

MR. ROSENBERG: Yes.

For the record, I offer exhibit 5 in evidence.

THE COURT: Mr. Brady?

MR. BRADY: No objection.

THE COURT: 5 is received.

(Plaintiff's Exhibit 5 received in evidence)

MR. ROSENBERG: And I would like to present it to the witness, with the Court's permission.

THE COURT: Please do.

Q. Mr. Latsis, the form, which is exhibit 5 for identification, indicates on it the Meyer Agency, 35 Church Street, Hamilton, Bermuda, am I correct?

A. That's correct, sir.

Q. Is that the agency you spoke of earlier?

A. Yes. Meyer, yes.

Q. Did this document on Chandris' heading concern itself with your care?

A. That is correct.

Q. And can you tell us if you recognize the signatures on that page?

A. The signature of the master I recognize because I've seen it before. Dr. Gonzalez's signature I didn't know, but you can read it.

[79] Q. And in addition, there is the signature of the purser, I correct, the purser on board the ship?

A. The one in the middle seems to be the person, because he spelled his name.

Q. And the master of ship was the captain, am I correct?

A. That is correct, sir.

Q. And this form is a request for medical treatment, am I right?

A. Request for medical treatment.

Q. And how were you designated on this form?

A. Name of crew member: Latsis, Antonios.

Q. And what was your position as designated on this form?

A. Crew member.

Q. Is that an accurate statement?

MR. BRADY: Objection; that's not what the document says.

MR. ROSENBERG: It says "name of crew member."

THE WITNESS: Name of crew member.

MR. ROSENBERG: Name of crew member.

MR. BRADY: And you asked for position, and there is an indication for position.

MR. ROSENBERG: No, no, I asked the name.

THE COURT: All right, and the second question [80] was, what's the position, and the position, would you read that to the jury, please, sir?

THE WITNESS: Super engineer. Super –

THE COURT: Maybe you can spell it, if you want.

THE WITNESS: It is not completedly spelled.

Excuse me. I can see better this way.

Supt. engineer.

THE COURT: S-u-p-t?

THE WITNESS: S-u-p-t, period. Kind of fuzzy. I don't know why. Supt., superintendent engineer, I suppose, in short.

Q. And this is dated?

A. May 14, 1988.

Q. Mr. Latsis, the night of the admission you were in the bed in the hospital, you've described that, correct?

A. Yes.

Q. And the next day, can you tell us to the best of your recollection what transpired?

A. The next day, Dr. Hamza came to visit me after he was called by my wife, and he told me that he had a conference call with Dr. Materna and another doctor whose the name I didn't know at the time – I didn't recognize, rather. It turned out to be Dr. Mittl. And that that they want me to call them and that he was going to go ahead, with their consent, their permission or their agreement, with the [81] operation or procedure to reattach the retina.

Q. Can you tell us how you felt on that day?

A. Psychologically terrible, because I didn't know how serious the problem was. I knew that the operation, on an isolated island with one doctor eye specialist, he gave me very limited possibilities. If the doctor was not as skilled as I could have had in the United States, I had no choice. I felt very bad. But the doctor sounded good, but again, I didn't have options open to me at all.

Q. And did he give you any idea as to the prognosis in terms of the outcome of that surgery before it was undertaken?

A. Yes. I asked him the question specifically, and he said, well, if – I am confident that I can do that because I've done it before several times, and the possibility of seeing again are good, but to what extent, it varies. The fact that you have been with detachment for two days is not a good starting point.

MR. BRADY: I'm going to object to that statement, your Honor, and ask that it be stricken since Dr. Hamza is not going to be a witness here.

THE COURT: Mr. Rosenberg?

MR. ROSENBERG: Well, in terms of the probative value of that hearsay statement –

THE COURT: First of all, is there an exception [82] that is applicable?

MR. ROSENBERG: I'm going to refer the Court to what I believe should be the statement concerning the state of mind of the declarant, who is, in this case, and the occasion for it –

MR. BRADY: I have no objection to his description.

MR. ROSENBERG: Reference is 804.

THE COURT: Just tell me the rule.

MR. ROSENBERG: (B)(5), your Honor.

THE COURT: I'm sorry?

MR. ROSENBERG: (B)(5).

THE COURT: (B)(5)?

No. The statement which you heard, ladies and gentlemen, in response to the prior question is going to be stricken from the record. What that means is that it will play no part whatsoever in your considerations and will not be considered as evidence in this case.

Please proceed, sir.

Q. Can you tell us, sir, was the surgery undertaken?

A. Yes, it was.

Q. And can you tell us how that progressed from the poinit of view of what you recall about it and what you were aware of?

A. I'm not sure I understand the question.

[83] Q. Well, were you put to sleep during the course of that procedure?

A. Yes. I was then prepared for – I was given an injection for the first step of hypnosis or anesthesia, and then they told me I would be feeling drowsy and then they will wheel me to the operating or preparation room

and then they will give me the full-fledged anesthesia. And just, that's as far as it went, and they did proceed to do that. And the next thing I remember back into the room.

Q. You were completely asleep during this whole procedure, am I correct?

A. Yes.

Q. Now, at the time that you were admitted to the hospital on the morning following, can you tell us, tell the jury, what vision you had in your right eye?

A. I cannot see at all for 75 percent of the center of the eye. Could only see light on the sides.

Q. And following your awakening in your room – it was the hospital room, I take it?

A. Yes.

Q. How long a period of time did you remain in the hospital?

A. Another five days after the operation.

Q. And during that interval, were you seen periodically by Dr. Hamza?

[84] A. I was.

Q. And what, if any, steps were taken with regard to your eye care in that time?

A. I had an eye patch, and he said it would be examined by him at least once a day. The first day he came back in the afternoon and the next day he came twice. And he said it was progressing well. I had eye

drops and washes and pain killers, which I didn't know what they were. They were minute little pills.

And he asked me if I wanted to take them off gradually as the days progressed so I can feel more of the progress of the healing and I could report it to him, which I did, and eventually I could take one of these pills every six hours.

And at one point, the third day that I could feel more of the progress, I felt that there was some kind of irritation in the eye which I could not feel the second day, for instance, and I called the attending physician at the hospital and I told him, and he prescribed – he reported it to Dr. Hamza.

He came and gave me an antibiotic injection in the eye all around, and he says he could see an infection developing again. And after that, it felt much better and the progress was steady to where he would allow me to fly back to the States.

[85] Q. And when was it that you left Bermuda?

A. I left Bermuda, I believe, the fifth day after, but I could be wrong by one day.

MR. ROSENBERG: If your Honor please, I would like to offer into evidence exhibit 9, the hospital record concerning that admission.

THE COURT: Mr. Brady?

MR. BRADY: No objection.

THE COURT: Exhibit 9 is received.

(Plaintiff's Exhibit 9 received in evidence)

MR. ROSENBERG: May I present it to the witness, your Honor?

THE COURT: Yes, sir.

Q. On the face of the hospital chart, exhibit 9 in evidence, it indicates separation date. Is that approximately the date you left, the 22nd of May?

A. The 22nd, yes.

Q. And how were you feeling at that time physically?

A. Well, physically I was allowed to take a shower the fourth day after the operation by protecting my head, you know, and even if some water came into the eye it wouldn't have been a tragic thing anymore. I still had to maintain a patch because I was very sensitive to light.

And I was asked not to – I was dictated not to lift any weights, not to exert myself at all with any [86] lifting, not to lean over and read things over a table or not to lean over, period, as much as I could, and then be taken care of by my regular doctor, ophthalmologist or specialist in New York, who will take care from there on to tell me what I do.

Q. Who did you make contact with when you returned concerning your care?

A. Immediately Dr. Materna contacted me in Bermuda and told me that he had arranged for me to go directly from the airport to Dr. Mittl's office because my arrival time was about noon, early in the afternoon, and

he had made an appointment. And I proceeded to Columbia Presbyterian Hospital, Harkness Eye Center, I believe it's called, in the Bronx.

Q. And were you examined there?

A. I was examined.

Q. By Dr. Mittl?

A. By Dr. Mittl, whom I met for the first time. He proceeded to examine the eye for the infection first, and then he examined the other eye for possibility of retina detachment or beginning of it.

Q. And did he report any findings of the other other eye?

A. He told me I didn't need any more antibiotics on my operated eye because the infection was under control, and [87] that the left eye, he was happy to report that there was no detachment of the retina at all or sign of it.

Q. And did you continue under his care, Dr. Mittl's care?

A. He told me – he gave me some eye washes, some antibiotic drops to keep changing on my right eye, and told me that in one week he will recommend for me to have an appointment with him to see how it progresses.

Q. And thereafter, from time to time did you continue under his care?

A. Then he proceeded after that to give me another, two weeks later, another appointiment. He felt that it was progressing well enough the first week to wait another two weeks, and at the end of the two weeks, he said now

you can come in two weeks again before you go back to work, as he anticipated the progress to be.

Q. Over what period of time did you see Dr. Mittl?

A. The first day, and one, two, three times after that.

Q. With respect to the use of your affected eye, your right eye, were you able to use your eye in this period of time?

A. The first time I visited him, he asked me to read the chart with that eye. I could not read even the largest letters at all. But he persisted, and he said stand up and [88] go as close to the chart as you can until you start seeing something. So I believe about six feet I saw the largest letter. That's about it. And he thought that was good progress for the time between the operation.

Two weeks later, he asked me to see sitting down. I could not see it, but I could see more, a little bit of an outlinie. He considered that good. And on the third time before I went back to work, the improvement was very slight, and he explained to me that things – he will give it six months to see how the progress will come, but not to be very optimistic because it could or could not come back to the original vision.

Q. And were you able to use your right eye in normal activities in any way during that period of time?

A. No. He again warned about not rushing to lift anything, any weights. Maybe my briefcase, that's about all. And not to lean over a lot, not to stoop down over things, because that would put pressure on the eye, and he wanted to make sure that the healing was complete way beyond the prescribed six weeks.

Q. Did you have a covering for your eye for part of that time?

A. No, it was not necessary to keep covering, but he advised me if I didn't feel, which I didn't feel, comfortable with strong light, to use sunglasses and to [89] protect that eye and until it progressively felt more and more comfortable, which he anticipated it would.

Q. And you returned to work ultimately?

A. At the fifth week, about, after my return, fifth to sixth – it was the Fourth of July weekend – before the weekend, I flew back to Miami with my wife and with the intention to start work, which I did the week after.

Q. How was your vision by that time in your right eye?

A. The vision, I couldn't tell any great improvement. I didn't have my own chart or the distances and all this, but it was good in terms of the eye feeling better and in terms of being able to see colors, see light, see objects in the distance, large objects. And I was anxious for that to improve.

Also, there was distortion in the middle of my eye. Like a frame of a door, for instance, looked like it was wharped when I looked at it through the middle of my eye, and I reported that to the doctors as well.

Q. Have you ever experienced anything like that before that period of time?

A. Never.

Q. And when you returned to work, what kind of activities did you engage in?

A. I started again with my normal routine. I took [90] all the information that was there from the ships, because we were attending several ships at the same time. And I proceeded to the first ship – I was in the port of Miami the coming Friday – the Britanis, which we routinely visited every Friday and Sunday. And Mr. Kaparis was overseas, so I kind of filled in for him. I took care of all the immediate problems. He called from time to time. I record to him the progress.

How far do you want me to go with this?

Q. Well, for how long a time did you remain on duty in Miami that particular tour or that particular segment of time, approximately?

A. We are talking July and August, and in August I started coming back to New York to visit the Galileo. She was on her last couple of months of cruising before she will go to the conversion. Take some of the specifications, relay them to the different shipyards that had questions.

I visited the Amerikanis, also, in the Port of New York and doing some work on her. So the weekends were taken by visiting New York for the next four weekends, and returned to Miami during the week to attend to all the other office activities, and Friday the Britanis.

On September I took – yes, I took vacation for three weeks, and one week visiting the construction people in Greece, the factory. And the first of October when I [91] returned to the states, I boarded the Galileo and started the six months' conversion trip to Germany.

MR. ROSENBERG: If your Honor, please, I would like to offer into evidence the records of Dr. Mittl, Plaintiff's Exhibit 8 in evidence.

THE COURT: Mr. Brady?

MR. BRADY: No objection, your Honor.

THE COURT: Exhibit 8 will be received.

(Plaintiff's Exhibit 8 received in evidence)

Q. Did you have occasion during the summer of 1989 to visit with Dr. Mittl at his office?

A. Yes, I did, sir.

Q. And when was the last time you saw Dr. Mittl?

A. The last time up to this date, today?

Q. No, no, when was the last time?

A. Oh. The last day I saw him before I went back to work.

Q. And have you resumed treatment with any other ophthalmologist following seeing him?

A. Yes, he told me – the doctor I forgot the actual name before, Dr. Mittl, told me I could return back to Dr. Materna's care, and the problem with the eye, he could monitor my progress very competently, and if I needed any more specific conference, he will have it with him. And I did just that.

[92] Q. And have you been the patient of Dr. Thomas Materna concerning your eye care since that time?

A. I certainly have, yes, sir.

Q. Up to the present time?

A. Up to the present time.

Q. Now, you indicated to us that the Galileo was about to embark on a major reconstruction?

A. Yes. Yes, sir.

Q. When was that?

A. She was going to do the reconstruction from the fall of 1989 to the spring, middle spring of 1990.

Q. And did you –

A. Which she did.

Q. Did you participate in that work?

A. Yes, sir, I did.

Q. And did you travel with the ship?

A. I joined the ship in the Port of Philadelphia. I believe it was the 30th of September. We proceeded the same day, the same afternoon, to sail with destination Bremerrhaven, Germany, with a number of technicians on board for the removal and number of the people from the shipyard and Mr. Kaparis and another superintendent engineer with whom we divided the work supervision of the ship.

Q. For how long a period of time did you remain on that particular job?

[93] A. For six months, sir.

Q. And with what frequency did you work on the vessel in that period of time?

A. Every day, seven days a week, from morning to about 11 o'clock in the evening.

Q. How was your vision during that period of time?

A. By that time, I believe – I don't recall exactly what date. I had visited Dr. Materna I think it was before I went on vacation, and he examined the eye and he took the measurements and everything. He said let's hope that something better will happen, but at this moment it looks like it's stabilized at this level of vision.

Q. And can you just describe to us what that level of vision was at that time?

A. Without corrective lens, the normal distance – I cannot see the large letters on the chart. With corrective lenses, perhaps I can see the outline of the large letters.

Q. Did the appearance of your right eye, was that altered in any way in the course of this experience?

A. Definitely. My peripheral vision, because of the operation, the buckle that they put on the eye to retain the retina in position, I lose a lot of my peripheral vision because the eye cannot move in that direction. And the chart is what I just told you, plus the size of the eye is smaller and the agility seems to be less.

[94] Q. Do you have any difficulty in moving in ocular movements, moving your eye from side to side?

A. Yes. The right eye is restricted definitely. You can observe it by looking at it.

Q. Now, before this procedure was undertaken, did your eyes look the same, your left and right eye?

A. Yes, they did.

Q. May I ask that the witness be permitted to step down so he can stand within distance and the jury can observe that?

THE COURT: Why don't we let him do that when he steps down. Why don't we just keep going now, please.

Q. This job on the Galileo, what did it entail?

A. It entailed supervising – first of all, we divided all the specifications and different teams attended to different tasks and removals, reconstruction; putting bow thrusters on the ships – they are propellers that they thrust the ship sideways and they help dock and undock; totally remove the two regular propellers; overhauling the main engines; rebuilding the boilers; totally reconstructing the accommodation spaces – cabins, adding cabins, adding lounges and totally reconstructing all the public rooms, dining rooms. I can go on for hours.

Q. That's enough.

What were your duties in terms of this kind of [95] work?

A. My duties were basically overall, because I was a second man in command, to overall supervise the project. So if something escaped any other's responsibilities, I was to take care of it and bring it to the attention of Mr. Kaparis and our committee, and specifically I did. I also was in charge completely of the dry docking itself, of the

bottom removal of the ship, cleaning, removing the propeller, putting the bow thrusters, putting the new air conditioning units, to do the evaporators for producing water, all the structures because we have a – I was the only attending naval architect.

The new structures they put on the ships for classifications, approval, stability, electronics. We added satellite communication systems. There's too many to – there's a telephone-book-size of specifications that we attended to.

Q. And were you compensated during that period of time at the rate you have indicated to us earlier?

A. I was on this full employment by Chandris with my regular salary.

Q. And the charges for the hospital care in Bermuda, who paid for those?

A. The charges were funneled through the agent to the Chandris, Incorporated in New York.

[96] Q. And with respect to your follow-up care, who paid for that, with the ophthalmologist in New York?

A. The ophthalmologist also, I submitted – I received his bill and I submitted it to Chandris for payment under the regular medical coverage.

Q. And after the conclusion of the Galileo's work, what other work did you do for Chandris?

A. Well, first of all, I returned on board the Galileo. Of course I crossed the Atlantic again for three trials. We

went to Fort Lauderdale. We also had some preparation there for crews.

Unfortunately, something else happened to that ship and we sailed up north to Norfolk, and we redry-docked the vessel for another week, sailed back with the vessel back to Miami, and after that she started sailing regularly and she was on weekly attendance by myself and another engineer.

Q. And did you have any other duties with respect to other vessels in the fleet, the Chandris fleet?

A. Yes. Because of my position, I was not limited to any one or two specific ships, I was in charge of all the ships that tradeed in the area, as I originally said.

The new ship, the Horizon, arrived a couple of months later, May, a month and a half, actually, May, early May of 1990, in the Port of New York, after which time I [97] came to New York and I stayed with her through the inspections of the Coast Guard, classifications, and so on for her commissioning for 12 days.

Q. For how long a period of time did you remain in the employ of Chandris company?

A. Totally, from middle of January of 1989 to the third week of November of 1990.

Q. Can you tell the jury the circumstances of your termination of employment from Chandris?

A. Well, towards the end of the large project, the conversion of the Galileo to Meridian and the commissioning, total commissioning and successful running of the Horizon, I seemed not to have a central project, major

project besides the condition of the ships and keeping them in good running condition.

And so I inquired into the company's headquarters about my role in the future, and for many reasons, but in particular my duties and also the fact that I was expected to move my family to Miami, which was a major undertaking on my part and a definite move.

So the word trickled down to me through the New York office that when they anticipated the plans they had were not quite shaping up the way they thought they were going to, and they didn't exactly know how they were going to use me, which I interpreted to be you can take your own [98] action or you can leave. So it would be promised by Mr. Kaparis that there would be a letter coming to me regarding the circumstances. I never got that letter.

Q. And when when you left Chandris, what kind of employment did you seek out?

A. I just passed the word around to the people that I know in the industry, which I know quite a few, that I'm available. There was no particular offers directed my way, so I proceeded to reestablish myself as a consultant, a practicing consultant, on which I gradually started getting work.

My first assignment was with the Maritime Administration reactivating ships for the Gulf War for Desert Storm.

Q. And how long did that last?

A. That lasted for a month and a half on one ship and about 20 days on another ship.

Q. And how were you paid for those jobs?

A. On one occasion I was paid as a supervising engineer for the major contractor, Steven's Technical Services. Another second assignment I was the contractor myself, because I had obtained my maritime administration's contractor status due to my qualifications, and they gave me the assignment directly.

Q. Did you form a company to do work on your own?

[99] A. I was, yes, advised on the regulations of the maritime administration that you have to have a company, an entity, which has to be examined by them, and I did create a New York operation called LMC Marine Technical Services.

Q. Now, can you tell us how you faired as far as your income is concerned following departure from Chandris' employment?

A. Well, there was a flurry of activity, as I said, around the beginning of 1990 which ebbed down quite a bit as the year progressed and the war had ended, some assignments from Chandris themselves for four or five days, I believe the first year, to prospective new acquisitions of ships, tankers.

THE COURT: Excuse me, Mr. Latsis. Could you answer counsel's question, please? He asked specifically about the income rather than each individual position.

Could you answer him, please, sir?

THE WITNESS: Yes. What was my income at the end of the first year?

THE COURT: Yes.

THE WITNESS: The net income came to – I believe I have it somewhere. It was 48,000 –

I don't have it with me. I've given it to you, I believe.

Can I go to my briefcase, please?

[100] MR. ROSENBERG: If your Honor please.

THE WITNESS: Because I have it written.

MR. ROSENBERG: He has notes he made. I don't have a copy.

THE COURT: Do you have something that you can –

MR. ROSENBERG: I have an exact copy. I made a Xerox copy.

THE COURT: Have you shown this to Mr. Brady?

MR. ROSENBERG: It was done this morning. It was a compilation. I don't expect to offer it into evidence. Just notes he made from the tax returns that have been marked in evidence.

THE COURT: Give one copy of it to the witness.

MR. ROSENBERG: That's the only one I have, your Honor. This is something else.

A. For my tax returns I reviewed today, 1991, at the end of the year my net income was 39,874. The gross, of course, was larger, but I had to deduct out-of-my-pocket expenses for performing the business.

THE COURT: So that is net?

THE WITNESS: That is net, as though it was a check, for instance, for me.

Q. And 1992?

A. 1992. 1992 was a better year. It was $58,358, after expenses.

[101] Q. And with respect to your physical condition, your vision, can you tell us what that is today?

A. The vision, unfortunately, has not improved at all since the examination September of 1989.

Q. And does that have any impact on your work?

A. On my physical work, yes. My peripheral vision is very important. I inspect ships, I inspect tanks, I go to dark areas, areas with a lot of steel around me. I always have to be much more careful than I would than I was before.

Q. Why is that?

A. Because of my peripheral vision and objects being near me and being afraid of injury, having in a distance not a good depth perception because only one eye can see in normal acuteness. And in driving also I have to be much more careful in the peripheral vision turning to the right. I have to turn my whole head all the time, where before my peripheral vision was enough to cover a big area.

And also the natural worry that if something happens to the other eye, always safeguarding this, you

know, much more and being limited to what assignments I will take.

Q. And what about close work, has any effect on close work?

A. My eye gets more tired now, the good eye, more [102] often because it doesn't have the assistance or the balance of the other eye. To play sometimes also tennis, I'm a right-handed person, so the eye depth perception is much more difficult. In fact, at the beginning I had quite a bit of difficulty. Now slowly I'm adjusting.

Q. And what about your pastimes, your free time, your –

A. I have found that I'm not doing as much reading, I'm not doing as much watching television, trying to preserve the strength of my good eye for necessary things at work.

MR. ROSENBERG: May we approach, your Honor?

THE COURT: Sure.

(At side bar)

MR. ROSENBERG: I wanted to plan some time. Did you indicate you would take a recess?

THE COURT: Yes, we will have ten minutes.

MR. ROSENBERG: Okay, let me just collect things during the recess rather than stumbling around now.

THE COURT: How much longer is it going to be?

MR. ROSENBERG: Not much longer.

THE COURT: How much longer? We've been going an hour.

MR. ROSENBERG: I would say ten minutes at most.

THE COURT: Okay. But just ask the questions.

[103] MR. ROSENBERG: I'm trying.

THE COURT: You are better, but you can do better.

MR. ROSENBERG: There's a competing thing. I want complete it, and –

THE COURT: Just useful questions, okay?

MR. ROSENBERG: Okay.

THE COURT: Thank you. We'll take ten minutes now.

(In open court)

THE COURT: Ladies and gentlemen, we are going to take a very short recess now to allow you to stretch your legs, use the facilities. And if you can come back in ten minutes, please. Thank you.

(Jury leaves courtroom)

THE COURT: Thank you.

Do we have copies of the exhibits, friends?

MR. BRADY: I thought all the originals were provided.

MR. ROSENBERG: All the originals are here. You want additional copies?

THE COURT: The answer is there is no copy. Okay.

MR. ROSENBERG: My own copy.

MR. BRADY: We each have almost a complete set. [104] We each have a set of our own, and the originals were provided to the Court.

THE COURT: Okay. All right.

MR. ROSENBERG: Is that all right?

THE COURT: Well, generally we get a copy, but if we don't have a copy, we don't have a copy okay.

MR. ROSENBERG: We can do it overnight, if you like, your Honor. We can have another copy made.

THE COURT: If it's not a lot, that would be a big help. Thank you.

(Recess)

(In open court; jury not present)

THE COURT: Following Mr. Latsis we will have some cross. Do we have an estimate?

MR. BRADY: I would say it's likely to go to the end of the day, your Honor, maybe. I hope to finish sooner, but –

THE COURT: Okay.

MR. BRADY: I'd say there's a fair chance that it would be.

(Jury enters courtroom)

THE COURT: Thank you.

Mr. Rosenberg, go right ahead, sir.

MR. ROSENBERG: I would like to offer into evidence exhibits 10 and 11, a 1989 and 1990 W-2 statement, [105] tax statements of Mr. Latsis.

THE COURT: Mr. Brady?

MR. BRADY: No objection, your Honor.

THE COURT: 10 and 11 will be received.

(Plaintiff's Exhibits 10 and 11 received in evidence)

MR. ROSENBERG: And what has been marked as exhibits S and T, the 1991 individual and corporate returns of Mr. Latsis and his company.

THE COURT: Mr. Brady?

MR. BRADY: No objection.

THE COURT: S and T will be received.

(Defendants' Exhibits S and T received in evidence)

MR. ROSENBERG: No further questions, your Honor.

THE COURT: Thank you, sir.

Would you care to cross-examine, Mr. Brady?

MR. BRADY: Yes, your Honor.

CROSS-EXAMINATION

BY MR. BRADY:

Q. Good afternoon, Mr. Latsis.

A. Good afternoon.

Q. I believe you testified today that you have a couple of licenses from the Greek Merchant Marine; is that correct?

[106] A. Yes, sir, I do.

Q. A second mate's license?

A. Second mate navigator and chief mate.

Q. And chief mate.

Do you recall testifying in this matter in a deposition in January of this year?

A. Do I remember if I was asked the question?

Q. I'm not asking that now. I'm asking you really if you recall testifying –

A. No, I don't recall.

Q. – at a deposition?

A. I do not recall.

Q. You don't recall we had a deposition January 26, 1993?

A. Oh, yes. Whether I was asked the question, I don't remember.

Q. We'll get to that in a minute.

Subsequent to that deposition, were you given a copy of the transcript of the deposition?

A. Yes, sir.

Q. And did you have a chance to review it?

A. Yes, I did.

Q. And did you execute that transcript as being accurate with your signature at the end of it?

A. Yes, I did.

[107] MR. BRADY: I would like to offer into evidence, your Honor, a copy, or the original, actually, of the transcript of Mr. Latsis' deposition as exhibit B.

THE COURT: Mr. Rosenberg?

MR. ROSENBERG: I have no objection.

THE COURT: Exhibit B will be received.

(Defendants' Exhibit B received in evidence)

MR. BRADY: Thank you, your Honor.

Q. Mr. Latsis, do you recall being asked the question during that course of that deposition if you had any licensing from any maritime authorities?

MR. ROSENBERG: Objection, your Honor. May we have the line and page and specific question?

MR. BRADY: I'll get to that.

Q. Specifically at page 7, lines 18 to 21.

A. Yes, I do. I do, sir.

Q. Do you recall that?

A. Yes.

Q. Do you recall being asked the following question: "Do you have any licensing from maritime authorities, Coast Guard, or any other maritime entity?"

A. Correct, sir, I was.

Q. And do you recall what your answer was?

A. No.

Q. Mr. Latsis, when you worked for Chandris, what [108] was your usual work week?

A. My usual work week would be, if a ship was in port, for instance, in Miami where it was based, I will go to the office first thing in the morning, see if there was any transmissions from the other ships requesting assistance or whatever.

Q. What day of the week would that be?

A. That would be – well, in Miami the ship was the Britanis on Fridays and Sundays, and the Galileo on Sundays. And on Sundays, I believe –

Q. And what would you do on Monday?

A. Monday we'll go back to the office and again start the routine of examining all transmissions from the ship and see what the immediate attention they needed. Sometimes they needed emergency attention. And then we will proceed with the projects that we had planned for maintaining the ships as we knew them and as we had

planned in attendance for upgrading or repairs as necessary.

Q. And that would all be done in the office in Miami, correct?

A. That is correct.

Q. And the same is true for Tuesday?

A. The same is true for Tuesday.

Q. And for Wednesday?

A. For Wednesday.

[109] Q. And for Thursday?

A. For Thursday, however, I have to make a correction to myself. The ships in Puerto Rico were sailing from Sunday – from Monday to Tuesday. So on occasion we would go to Puerto Rico. I would fly Sunday night and I would be there Monday for the attendance and sail with them from St. Thomas Tuesday night and come back Tuesday evening from St. Thomas, so that broke the week.

Q. But that wasn't the usual week. That was as necessary, correct?

A. That was as necessary, as planned, yes.

Q. I'm just trying now to get the understanding of what your usual work week was.

And Monday through Friday, what were your hours in the office in Miami?

A. From officially 9:00 in the morning to, again, officially 5:00, but a lot of times we stayed later.

Q. I see. And when the vessels were in port in Miami, what time did they arrive in port in the morning?

A. They arrived about 7:30, 8:00. New York at 8 o'clock.

Q. And when did they sail again?

A. Again, it varied, but normally about 4 o'clock to 5:00.

Q. And your visits aboard those ships would occur in [110] port on the weekends, then, correct?

A. They would occur in port on the weekends, correct.

Q. With the exception of Puerto Rico?

A. With the exception of Puerto Rico and the exception of the times that I took a trip with the ship.

Q. Now, when you went to visit one of these ships, for instance, if you had to go to visit the ship in Puerto Rico, would your expenses of such visit be reimbursed?

A. Yes, they was.

Q. And isn't it true that the way that was done was you would submit an expense report, which would then be reimbursed by the company?

A. Correct, yes.

Q. And you prepared those expense reports yourself, correct?

A. I did, yes.

Q. And you first became an employee of Chandris in January of 1989?

A. That's correct.

Q. And can you tell me approximately how many days during the month of January 1989 you spent attending vessels as part of your job?

A. In the wintertime, it would have been three days on the weekend, Britanis, Galileo, Britanis, Friday, [111] Saturday, Sunday.

Q. Are you saying that was every week?

A. Of course. It was in the port that we were based.

MR. BRADY: I would like to offer into evidence now Defendants' Exhibit D, if I may, your Honor.

THE COURT: Which is, please?

MR. BRADY: Which is a copy of the Chandris check and expense sheets prepared by Mr. Latsis, as well as the support of what they are for.

THE COURT: Did you say, Mr. Brady, one check, or many?

MR. BRADY: It's a copy of a check, one check, with lots of support data behind it. The check itself is dated April 18, 1989.

THE COURT: Thank you.

Mr. Rosenberg?

MR. ROSENBERG: I have no objection. The date is related to a different time than the question, but I don't have any objection to it.

THE COURT: Okay. I'm sorry, sir, tell me again the designation on the exhibit.

MR. BRADY: D.

MR. ROSENBERG: D, as in David.

THE COURT: D will be received.

[112] (Defendants' Exhibit D received in evidence)

MR. BRADY: Thank you, your Honor.

And may a copy of that exhibit be given to the witness, please?

THE COURT: Certainly.

You folks don't need to ask. You can put the exhibits before the witness.

MR. BRADY: Thank you, your Honor.

Q. Mr. Latsis, if you would turn about halfway through that exhibit, I believe you'll find a page dated February 5, 1989, and entitled "Travel Expenses."

A. Second page, you said?

Q. No, I think it's about halfway through, sir.

Allow me to show you a copy.

A. Yes, because the first page here is a check, copy of a check.

Q. Well, that's the first page.

A. Which page are you –

Q. About in the middle of the exhibit.

A. Okay.

THE COURT: Maybe you could find it for him, Mr. Brady, please.

Easier said than done.

MR. ROSENBERG: I have a copy of what I think you're looking for. Is this it?

[113] MR. BRADY: That's it.

MR. ROSENBERG: It should be in there.

THE COURT: Would you put it before the witness so you can question.

MR. BRADY: Here it is.

THE COURT: Okay, fine. Good.

Q. Now, Mr. Latsis, that is your summary of travel expenses for the month of January 1, '89, is it not?

A. Yes, it appears.

Q. And you signed it, didn't you?

A. Yes, I did.

Q. And is there any indication on that document of trips to any vessels?

A. LaGuardia Airport to Miami.

No, there doesn't appear to be any trips to a ship, but the ships were attended in Miami.

Q. Well, how did you get to the ship when it was in Miami?

A. By car, sir.

Q. And was there a parking fee there?

A. Not on the parking fee – are you referring to the parking fee? That would say here. This is for leaving the car at the airport where I flew away and came back.

Q. Well, was parking free at the terminal in Miami?

A. Yes, it was.

[114] Q. So you have nothing to indicate that you attended any ships other than in Miami?

MR. ROSENBERG: Objection to the form of the question, your Honor.

THE COURT: Perhaps it could be directed to this document.

THE WITNESS: Can I answer the question?

MR. BRADY: I'm trying to direct it to this document, your Honor. I didn't get to finish the question.

THE COURT: All right. Go right ahead. Finish it, and we will hear it again.

Q. Aside from this document before us, do you have any documentation which would indicate that you attended any vessels in Miami during the month of January 1989?

A. No, sir, because there's some expenses associated with that.

Q. How about during the month of February 1989? How many trips did you make during that month?

A. All the time that the ships were in Miami, I attended them every time they were there. So if there were three calls – I don't recall the schedule by heart. The Galileo, and if Britanis were in – the Galileo was in Miami. The Britanis was in Miami part of the time.

Q. And were you the only superintendent engineer in the office?

[115] A. No, another two along with me. And Mr. Kaparis was the supervisor.

Q. And so did all three of you go to every ship every time in Miami?

A. No.

Q. Just you?

A. Mr. Kaparis didn't go. Mr. Kapetanakos went to the Britanis usually, and I went to all of them because I was the second in command.

Q. What about Mr. Salvatore Amar?

A. Mr. Amar also would go to the Galileo more exclusively than Mr. Kapetanakos because he had specific responsibilities related directly to that ship.

Q. And in those cases where other superintendent engineers were attending the vessels, you also accompanied them every time?

A. Correct.

Q. Every time?

A. I didn't accompany them. I went to look at other areas of the ship.

Q. But you went together?

A. Not necessarily. At different times.

Q. All right. But what I'm saying is that on all of those occasions, even if you attended a vessel yourself, even if another – excuse me. Even if another [116] superintendent officer attended the vessel, you also would attend the vessel?

A. Correct.

Q. And there would be no expenses to indicate that this was the case, would there?

A. No, sir.

Q. Let's look at the month of February '89. Aside from the purported visits in Miami, did you visit any ships anywhere outside the Port of Miami?

MR. ROSENBERG: Objection to the characterization, "purported."

THE COURT: Overruled.

THE WITNESS: Excuse me. May I ask –

THE COURT: Would you like that read back, sir?

THE WITNESS: No, I don't understand the question. Am I supposed to be reading from the log? I don't have a log, sir.

Q. You are supposed to be answering the question.

THE COURT: Would you ask the question again, please, sir.

Q. Aside from these trips that you described making to the vessels in Miami every weekend?

A. Yes.

Q. In February of 1989, did you visit any ships anywhere else?

[117] A. I don't recall, sir.

Q. All right.

A. Because I don't have a log.

Q. Referring to the second page of exhibit D, which is before you.

A. Okay, second page.

Q. Second page, sir. Start from the beginning, please.

A. It says March 6 here, yes.

Q. Yes, dated March 6. And it's titled "Expenses February 1989," is it not?

A. Correct.

Q. And it is signed by you, correct?

A. Absolutely correct.

Q. You prepared and submitted this document also, correct?

A. Yes, sir.

Q. And does that indicate trips to any ships?

A. Yes, to the S/S Victoria in San Juan.

Q. When was that?

A. That was February 5 in Puerto Rico.

Q. And what happened there?

A. Then I sailed, obviously, from this with the ship to St. Thomas, and from St. Thomas I returned back to Miami.

Q. And you flew from St. Thomas back to Miami, [118] correct?

A. Yes.

Q. And aside from that trip to Puerto Rico, no other ship trips are shown on this expense sheet, are they?

A. No. Some parking, gasoline and –

Q. Well, the parking and gasoline would be for what, sir?

A. If it was a rental car outside of the Miami area where I had that car leased by the company.

Q. Outside of the Miami area? Where outside the Miami area?

A. I suppose it would be Puerto Rico. We went also to Washington a couple of times.

Q. Is there a receipt attached to these documents that would show that expense?

A. There was originally, I hope, yes. There must have been originally a receipt wherever it was available.

Q. Well, you can't find any such receipt now; is that correct?

A. Well, I didn't take the time to go one by one on the receipts, sir.

Q. Please do.

A. Okay. We are looking for you for a receipt for a car rental, for a car, for gasoline?

Q. You cited to me as parking and gasoline for a [119] trip outside the Miami area It's listed on your expense sheet in the amount of $30.25.

A. Okay. There's one gasoline bill right here. It's in Miami area Then there's a second one, yes. Both of them are in the Miami area

Q. Where is the parking receipt?

A. The parking receipt, here, sir. Sheraton Brickell in Miami.

Q. So those were for trips in Miami?

A. Yes.

Q. How about for the month of March 1989?

A. Let's go to the next page, I suppose.

Q. I don't believe it's covered in that document, sir. Do you have any recollection of any trips to any ships outside of Miami area during that month?

A. No, sir, I don't.

Q. I'm sorry, if you look at the last page of exhibit D, I believe it does cover expenses for March of 1989.

A. The very last page?

Q. Yes, sir.

A. Okay, trip to Germany.

Q. Dated April 11. This page.

A. Okay, yes.

Q. Now, this indicates that you went to Germany, [120] correct?

A. That is correct, sir.

Q. And you went by a plane?

A. I went by plane, yes.

Q. And how long were you there?

A. Well, let me see the dates. From the 14th of March and returning ten days. To the 24th, I suppose.

Q. Did you visit any ships belonging to Chandris while you were in Germany?

A. Yes, I visited the new construction, the Horizon, being built in the shipyard.

Q. Well, that was not yet a ship was it? It was under construction, correct?

A. It was a ship under construction yes.

Q. But it was not on the water, it was in the shipyard?

A. It was in the shipyard, correct.

Q. It had never sailed, had it?

A. No.

Q. Aside from that, had you visited any other ships that are indicated on this expense sheet?

A. No. We visited the people that did the specifications for the Galileo.

Q. How about the month of April 1989, did you visit any ships during that month?

[121] I'm just asking for your recollection now, Mr. Latsis. I don't think it's in that document.

A. The month of April, again all the ships that were in Miami, the Miami area, an occasional visit to San Juan for the Amerikanis, the Azure, or the Victoria, as before. I don't have any bills here that I see.

Q. Okay.

A. I don't know if I have any at all that were given to the Chandris.

MR. BRADY: I ask that exhibit F be received in evidence. It's a copy of a check dated June 8, 1989, with various expenses and receipts attached thereto.

THE COURT: Mr. Rosenberg?

MR. ROSENBERG: No objection, your Honor.

THE COURT: Exhibit F will be received.

(Defendants' Exhibit F received in evidence)

MR. BRADY: Thank you.

THE COURT: Mr. Brady, why don't you just take all the originals so you don't have to keep walking back and forth.

MR. BRADY: Okay.

Q. Mr. Latsis, I'd like to refer you to the second page of exhibit F.

A. Yes.

Q. Do you recognize that document?

[122] A. Yes, sir, I do.

Q. Isn't that also a traveling expenses document prepared by yourself?

A. Yes, it is.

Q. Does that reflect trips to any ships in particular?

A. Yes, it reflects trips to the Galileo in the Port of Miami.

Q. Can you show me where that's reflected, sir?

A. That's reflected by means of the dinner that was served with Mr. Katsourakis. Mr. Katsourakis was the architect that designed the conversion, and I was in charge of taking him around on the ship and staying with him through the evening and discussing and having dinner with him.

Q. But on the document itself all that's reflected is dinner, correct?

A. Correct, but that reminds me of what the circumstances were.

Q. And that was the, which ship was that?

A. The Galileo in particular he converted.

Q. And that was while she was in port, correct?

A. When she was in port. And also I remember that we went to the Britanis because they were planning some light conversion on her, too.

[123] Q. Is that the same day?

A. No, it was a different day that the Britanis was called into port.

Q. So that's two days, correct?

A. That was at leasts two days, yes. That's what this reflects.

Q. Thank you.

I'd like to refer your attention now to May of 1989. Do you recall how many times you went aboard ships in May of 1989?

A. By heart, no, sir.

Q. I'd like to refer your attention to exhibit G, which is a copy of a check dated June 22, 1989, with various documents attached.

THE COURT: Mr. Rosenberg?

MR. ROSENBERG: No objection, your Honor.

THE COURT: Exhibit G will be received.

(Defendants' Exhibit g received in evidence)

MR. BRADY: Thank you.

Q. Now, the second page of this exhibit is a another expense reimbursements sheet prepared by you, correct?

A. Yes.

Q. And it's dated June 11, 1989?

A. Yes, it does.

Q. And it's signed by you, correct?

[124] A. That is correct, sir.

Q. And this indicates a trip to Baltimore from Miami, correct?

A. Yes, it does, sir.

Q. And this is in regard to the trip on the cruise to nowhere and a subsequent cruise to Bermuda in May of 1989?

A. That is correct, sir, yes.

Q. And aside from what you have already testified to about the two-day cruise to nowhere which preceded the trip to Bermuda, are there any other trips to ships identified on this expense sheet?

A. No, there isn't.

Q. There's also attached as, I believe, the last sheet of this document, exhibit G, a hotel bill in Baltimore, correct; a copy of a hotel bill from Baltimore?

A. Yes.

Q. Was that your hotel bill there?

A. If it's only one room, but there are two rooms here, I see.

Q. Well, actually I believe the last three sheets are three separate bills from the same hotel for the same evening, correct?

A. Yes.

Q. And those were for Mr. S. Amara, Mr. Ley, and [125] yourself?

A. Yes. They used my card, my gold card that I have with the hotel –

Q. Okay.

A. – to obtain a better rate.

Q. Do you know who Trident Marine is?

A. Trident Marine is a company that does, among other things, some fire protection inspections routine for

the ships, and from time to time they did some other work like quote evaporators and other equipment for the ships.

Q. And did you review these bills before you paid them?

A. I reviewed them, yes.

Q. And are they accurate to the best of your knowledge?

A. Yes. As far as I can discern, yes, they are accurate.

Q. Now, subsequent to this trip, you had surgery in Bermuda, correct?

A. Yes, sir.

Q. And you returned to New York directly from Bermuda to your home, approximately May 22 of 1989?

A. That is correct.

Q. And you stayed there, by your testimony, about six weeks?

[126] A. About six weeks, yes.

Q. And you were not working at that time, is that correct?

A. I was not, no.

Q. You next went back to your office in Miami in July?

A. In July.

Q. And approximately how many times did you visit ships in July of 1989?

A. I recall I stayed in Miami the first month, approximately, the balance of July, and then I came to New York because there was some minor emergencies both with the Galileo and the Amerikanis.

MR. BRADY: I offer into evidence Defendants' Exhibit I, being a copy of a check dated August 16, 1989, and various documents attached thereto.

MR. ROSENBERG: No objection.

THE COURT: Exhibit I will be received.

(Defendants' Exhibit I received in evidence)

Q. Mr. Latsis, I hand you a copy of exhibit I.

A. Thank you.

Q. Would you please examine the second page of exhibit I.

A. Yes, sir.

Q. That again is an expense reimbursement sheet [127] prepared by you, correct?

A. That is correct, sir.

Q. And it's titled "Expenses, July 1989"?

A. Yes.

Q. Correct?

A. Yes.

Q. Now, how many times did you visit ships outside of Miami, according to this document?

A. It looks like several.

Q. Well, can we be a little more specific, sir? Isn't it actually five?

A. Well, I have to group them, sir. I didn't – did you do that?

Q. Well, I'm asking you for your testimony.

A. But I have to look at the way I did it. I have to look at the dates, and if it's the same weekend we had the Amerikanis and the Galileo calling Saturday and Sunday. So I have to group them together before I answer you.

Q. Let's go line-by-line then.

A. Okay.

Q. The first line is transportation to and from Miami Airport on –

THE COURT: Why don't you let him see if he can group it and maybe that will move it along.

A. Okay. Amerikanis, Galileo, it looks like one [128] weekend here. One visit to two different days.

7/21st is another grouping, the Galileo and Amerikanis, Galileo on Saturday.

Q. Excuse me, sir. Are you referring to weekend of July 21, July 24?

A. Yes, that's another two days.

Q. Well, it says there, after "transportation to/from," Galileo, correct?

A. Yes.

Q. There's no entry for the Amerikanis that weekend, is there?

A. No, I don't see mention of Amerikanis, no.

Q. No, neither do I.

How about the weekend of the 28th?

A. That has mention of both ships.

Q. Okay. So, in total, that's five trips to ships in the Port of New York, correct?

A. Five days, yes.

Q. All right. And when it says the third line down there, "Transportation to Amerikanis, $35," could you explain to me what that is, please?

A. Okay. When I came to New York, because I had my own vehicles, I did not rent a car.

Q. Okay.

A. But my vehicle cost me totals and so on and so [129] forth, so I charged them a nominal fee of mileage from Rye to and from the pier.

Q. From Rye to and from the pier?

A. Yes.

Q. Does that include a parking fee as well?

A. No, does not include parking because we parked in the first level and we don't pay anything.

Q. There was free parking, okay.

Was there any indication that you sailed aboard any of these ships during the month of July 1989?

A. From this I cannot tell. The only one could be suspect is the Galileo.

Q. Which Galileo entry, sir?

A. There's only one Galileo, and I didn't visit – it's very unusual that I did not visit the Amerikanis the next day. So the only thing would be like I sailed with the Galileo and I came back the next weekend, and then I attended the Galileo that day in port and the Amerikanis the next day.

Q. Except that you indicate transportation to and from LaGuardia on July 21, which was a Friday, correct? And again on the following Monday, so it would have been difficult for you to go back to the airport if you were aboard the ship, wouldn't it?

A. Yeah. Yeah. I'm thinking if I came back from [130] Bermuda and I went to LaGuardia. But, you know, I can't tell definitely from this.

Q. But there is a taxi receipt attached, isn't there, from a trip from Rye to LaGuardia on July 4, 1989?

If you look at the receipts attached, one from Rye Brook Taxi?

A. For what date is that?

Q. July 24, 1989?

A. Okay. But which way? Returning, perhaps.

Q. From Rye to LaGuardia?

A. From Rye to LaGuardia, returning trip.

Q. So that would be on Monday going back to Miami?

A. On the 24th, yes.

Q. Let's move now to August of 1989. Do you have any independent recollection of how many times you visited ships during that month?

A. I believe every weekend.

Q. Where would those visits have taken place?

A. In the Port of New York.

Q. So how did it come you were visiting the ships now in the Port of New York instead of Miami every week?

A. Because the ships were sailing out of the Port of New York to Bermuda, both of them.

Q. Were there any ships calling in Miami at that time?

[131] A. Yes, I was attending also the Britanis on Fridays in Miami before I left to come to New York.

Q. I see. What time would that be?

A. That would be from 7 o'clock in the morning as she arrived, 8:00, depending on what I was doing at 7:00, until she sailed at 4:30.

Q. And then you catch a flight to New York?

A. Then I catch a 5, 6 o'clock flight to New York, and then the next morning I attend the early ship.

Q. And I'd like you to turn your attention to exhibit J, which is a copy of a check dated October 5, 1989, and various documents attached thereto.

MR. BRADY: Ask that it be received in evidence.

MR. ROSENBERG: No objection.

THE COURT: Exhibit J will be received.

(Defendants' Exhibit J received in evidence)

Q. If you turn to the second page of exhibit J, Mr. Latsis?

A. Yes, sir.

Q. That's another one of the expense sheets that you prepared for reimbursement, correct?

A. That is correct, sir.

Q. And that's covering the period of August 1989?

A. That is correct.

Q. And this identifies, by my count, four one-day [132] visits to ships in the Port of New York?

A. Are you referring to the fact that I visited the two ships in the same day each time?

Q. Well –

A. There are four different visits to New York, yes.

Q. August 5 and August 6?

A. That's two different dates.

Q. Right?

A. In one trip.

Q. That's two. There's one on August 11 to the S/S Amerikanis?

A. Uh-huh.

Q. And there's one on August 21 to the S/S Galileo, correct?

A. Correct. The next day I went.

Q. That's five. And then there's August 25, one to the S/S Amerikanis again?

A. Yes. There the reason I referred to it like this is because when I visited New York, I charge one or the other of the ships. I didn't charge both of the ships, because this was notice intended as a log of visiting the ships.

Q. I'm afraid I don't understand you. Weren't the ships in port on different dates?

A. They were.

[133] Q. One was in on Saturday and one was on Sunday?

A. One on Sunday. So when I visited New York from Miami, I had the airfare ticket, a ticket – I had a taxi to to my home and return to the airport. I visited both ships at two different dates, and I didn't necessarily on this expense sheet put both ships in every time.

Q. But on prior expense sheets, you did put both ships in?

A. Some occasions I did. There was no format to this. This was not intended as a log of visiting the ships.

Q. So then what you're saying is we can't really tell how many times you attended vessels from these documents at all?

A. It is entirely possible, yes, that there were more if they were in the same port –

Q. And it's also possible –

A. – on the same date or something on the sail date.

Q. It's also possible that there weren't more?

A. We would know there were ships in port because they were scheduled, sir.

Q. And we also know you attended on the dates that appear on the documents?

A. This is also correct.

Q. And we don't know about the other dates?

[134] A. You could be sure of the other days, sir, because they would not pay my return ticket to see one ship or the other.

Q. You don't have any documentation that would indicate those visits that don't appear on your expense sheets, do you?

A. No.

MR. ROSENBERG: Your Honor, please, we have gone over this.

MR. BRADY: That was for a different month, your Honor.

THE COURT: I'm not sure we have actually asked this question. I think the witness has already answered it.

Q. Did you do any sailings aboard these ships, Mr. Latsis, during the month of August? Can you tell from reviewing the exhibit J?

A. From this sheet it does appear so, sir, that I can tell from this log, from this expense sheet.

Q. It does not appear that you did sail?

A. I cannot be sure.

Q. Do you have any independent recollection of having sailed at that time?

A. No.

Q. Let's move on, then, to September of 1989. Do you recall independently any visits to ships during that [135] month?

A. No, except the very last day. If it was the weekend, a Labor Day weekend, it could be. I don't recall before I went on vacation.

MR. BRADY: I will offer in evidence Defendants' Exhibit K, which is the usual copy of the check. This one is dated November 7, 1989, with various documents behind it.

MR. ROSENBERG: No objection.

THE COURT: Exhibit K will be received.

(Defendants' Exhibit K received in evidence)

MR. BRADY: Thank you.

Q. I believe, if you take a look at the second page of exhibit K, Mr. Latsis?

A. Yes, sir.

Q. You will see a another expense sheet?

A. Yes, sir.

MR. ROSENBERG: Second page?

MR. BRADY: The second page.

Q. And it's entitled "Expenses for September 1989"?

A. That is correct.

Q. And what does that indicate about your visits to ships during that month?

A. That I went to the S/S Galileo on the 2nd of September, arrived in New York, I visited the Galileo, and then I went on to Athens sometime in the beginning of this [136] month, the 7th, I believe, transportation to JFK.

Q. And that trip was vacation, was it not?

A. That was vacation, with the exception of one week that I visited the manufacturers of the cabins, the architects and –

Q. You did not visit any ships during that period in Athens?

A. There were no ships in Piraievs at that time.

Q. And then the 30th, the next to the last line, indicates that you traveled to Philadelphia on the 30th to visit the Galileo, correct?

A. I visited, boarded the Galileo, and sailed with her.

Q. And that's when the Galileo sailed trans-Atlantic to Bremerrhave for conversion, correct?

A. Correct.

Q. How long a trip was that?

A. That was about a 14-day trip.

Q. 14 days. So you would have arrived in Bremerhaven on approximately October 13?

A. October 13, 14, I don't recall.

Q. And the dry docking or the conversion of the Galileo, this was a major project, correct?

A. Very big project, yes.

Q. Can you tell me approximately what the total [137] expense of that project was?

A. $65 million.

Q. And when she came out of the conversion, she wasn't the same ship, was she?

A. She was definitely not the same ship.

Q. In fact, she had a different name?

A. She had a different name as well.

Q. She was now the Meridian. The Galileo no longer existed?

A. That is correct.

Q. When did you return from Germany?

A. I sailed back to the Galileo for trials and shakedown cruises, they call it in the industry, to Fort Lauderdale at the beginning of March. I don't remember if it was the 10th or 13th or something.

Q. Isn't it true you were in Germany until approximately March 14?

A. Yes.

Q. Okay, so –

A. It was the 14th?

Q. I'm just trying to clarify.

So then you sailed from Germany on March 14th back to Fort Lauderdale?

A. That's correct.

Q. Would that have been another 14-day trip?

[138] A. That would be another 14-day trip.

Q. So you would have arrived in Fort Lauderdale around –

A. The end of March.

Q. The end of March?

Aside from your – well, as you previously testified, during that time you were spending all your time with the conversions, so you weren't visiting any other ships then?

A. That is correct.

Q. Upon your return to Fort Lauderdale, what were your duties then?

A. My duties was to stay with the ship until she was passed with the Coast Guard inspections.

Q. The Meridian?

A. The Meridian, yes. She was totally commissioned and ready to sail as a seaworthy vessel with regard to full certificates and testing of all the equipment.

Q. And I believe you previously described another week of dry docking in Norfolk thereafter?

A. Unfortunately, they discovered that one of the propellers had a problem.

Q. When was that?

A. Well, during the passage we entangled one with the ropes.

[139] Q. Allow me to withdraw that question and clarify it. I meant when was the dry docking?

A. Oh, the dry docking insued about a week and a half after the arrival in Fort Lauderdale.

Q. So that would have been early to mid April already?

A. Early April, 14th, I think, of April. Of course, something like this –

Q. And she was in dry dock a week, I believe you said, earlier?

A. She was about a week.

Q. So she came out again in mid April?

A. Mid April.

Q. And how long were you with the vessel after that before she received her commissioning from the Coast Guard?

A. I sailed back the vessel to Fort Lauderrdale and following.

Q. How long a trip was that?

A. Two and a half days, three days, something like this.

Q. When was the ship finally commissioned by the Coast Guard?

A. Exactly two weeks after we sailed from Miami, we went to Norfolk two and a half days, dry docked for a week, and two and a half days back. So altogether coming to about [140] 12, 13 days.

Q. She was dry docked through – got back, I'm sorry?

A. No.

Q. Let me withdraw the question. I believe I mis-spoke.

A. I didn't mean the dry docking.

Q. So she was finally commissioned, then, when she returned back to Miami from the dry docking in Norfolk; is that correct?

A. Yes, sir.

Q. And at what point did you resume your normal duties with the company post-conversion?

A. Immediately after that, the next morning I went to the office.

Q. You went to the office in Miami?

A. Yes.

Q. That would have been approximately late April?

A. Middle of April, I believe.

Q. So now I call your attention then to May of 1990 when the conversion is completed and you are back to your normal routine, correct?

A. Yes.

Q. Do you recall how many trips you made to vessels in May of 1990?

[141] A. Yes. I started out with, as I recall, could be more, with the Horizon being inspected at the beginning of May for 12 days in the Port of New York.

Q. Now, the inspection took 12 days?

A. No, the arrival to sailing is 12 days. The inspection – we started out with a Coast Guard inspection, took two or three days, the manufacturer's checklist. Then, subsequent to that, all the Department of Public Health, and then the inspection of the ships – different items that they observed during the crossing over from Germany on her maiden voyage, things were corrected and repaired by the shipyard personnel.

Q. And this ship is the new ship?

A. Is the brand-new ship, yes.

Q. This is a completely new building?

A. Correct.

Q. And isn't it true that she was a new ship and of a new class for the company?

A. Yes, sir.

Q. And that during that 12 days in the Port of New York, the company was holding parties aboard the ship every day to entertain travel agents and promote the ship for future business?

A. The parties, I'm not certain. What I was certain is they had an open house continuously with food. So agents [142] would come, take a tour of the ship, prescribed tour, and then they will eat something and leave.

Q. And that was going on for the 12-day period?

A. For the most of it. Well, no, you couldn't get anybody on board until the Coast Guard passed the inspection.

Q. Which was, as you said, two or three days?

A. No, four days usually.

Q. All right. Aside from those trips, aside from that time spent with the Horizon in New York, in May were you visiting any other ships during that month?

A. Well, then I returned back to Miami and –

Q. When would that have been?

A. I think – I don't remember the days exactly, but –

Q. Well, roughly.

A. After the 13th or 14th of May when she sailed, I think I returned back to Miami and –

Q. Well, I'm sorry to interrupt. Isn't it true that she only arrived in New York around the 14th of May and stayed until the 26th?

A. I don't remember the dates by heart. I may be wrong.

Q. Let me see if I have something here that can refresh your recollection.

[143] MR. BRADY: I would like to offer into evidence exhibit N, which is a copy of a check dated August 15, 1990, and various documents attached thereto.

THE COURT: Mr. Rosenberg?

MR. ROSENBERG: No objection.

THE COURT: N will be received.

(Defendants' Exhibit N received in evidence)

MR. BRADY: Thank you.

THE WITNESS: Thank you.

Q. Now, Mr. Latsis, there are a couple of longer sheets attached to this exhibit, I believe, and the second of those is an expense sheet for the period May 1 to May 31, 1990; is that correct?

A. Yes, it is, sir.

Q. And does that refresh your recollection as to what dates the Horizon was in Port of New York?

A. Yes, 5/14; for the next 12 days after 5/14, yes.

Q. It says in the second entry on the left under "date" being 5/14/to 5/26; is that correct?

A. That's correct, yes.

Q. And it would appear from examining that document that you returned to Miami on the 28th, correct, JFK from Rye?

A. Yes. May 28, right.

Q. And there are no indications on that document, [144] aside from the May 14 to May 26 item, of any visits to ships outside of Miami, are there?

A. Outside of Miami, no.

Q. And after you returned then in June of 1990, you resume your normal activities in the office, or from the office?

A. Yes, sir.

Q. And do you recall if there were any trips to ships outside of the Miami area in June of 1990?

A. Not readily.

Q. May I refer you to the other longer sheet that's attached to exhibit N.

MR. ROSENBERG: N, as in Nancy?

MR. BRADY: N, as in Nancy.

Q. Which I believe is your expense sheet covering the period June 1 to June 30, 1990?

A. Yes, sir.

Q. Does that indicate any trips to any vessels outside of the Miami area?

A. Yes, to New York.

Q. And that's on June 29, correct?

A. No, 6/15. June 15.

Q. Well, it indicates a trip to New York, but I don't see any indication of a trip to a vessel.

A. I beg your pardon. When you come to New York, [145] that's what I was coming for mostly.

Q. Well, can you please indicate to me, then, where it indicates the tolls and parking for the trip to the vessel the weekend of June 15?

A. Tolls and parking.

Q. The mileage charts that you stated that you put in for when you travel from Rye to the vessel, that you recall?

A. Yes. I don't have one charge here, but I have taxi.

Q. Well, you took a taxi? Is there a taxi receipt for that day?

A. Yes, you see it right there? It says taxi/limo, whatever it says there.

Q. For June 15?

A. For June 15, $62, yes.

Q. But that's from the airport in Miami to New York, LaGuardia Isn't that the trip from the airport to your house, sir?

A. Yes, that's correct. Yes.

Q. Well, that's not to the ship, then?

A. No, but –

Q. I'm asking you if there's any indication on this –

A. No, it doesn't say. No, sir, does not say [146] anything here about the ship, no.

Q. And you returned from New York to Miami on the 18th of June, correct?

A. Yes.

Q. So then it's not necessarily true that every weekend you came to New York you went to see a ship, did you?

A. If I –

MR. ROSENBERG: Objection.

A. Yes.

MR. ROSENBERG: Wait. Wait until the judge rules.

Argumentative.

THE COURT: Well, no, I think he is allowed to ask that in light of the answers to his questions.

Overruled.

THE WITNESS: Okay, so should I answer?

THE COURT: Yes, sir, if you're able to answer, please do. And if you need the question read back, please let us know.

THE WITNESS: No, I understood the question.

A. As you see on top, this form has the charge to the Horizon.

Q. Yes.

A. The company will not allow me to go on my weekend [147] home and charge this to the Horizon, sir. It has to be an expense definitely attributed to a visit to the vessel, and the major vessel here was the Horizon.

Q. I see. Thank you. So that brings us up to July of 1990.

In July of 1990, how many trips did you make to ships outside the Miami area?

A. I can't readily recall, but I know that I took three trips with the Horizon.

Q. In July of 1990?

A. I don't know if it was all in July. It was July and August. I remember that much.

Q. Three trips to the Horizon?

A. With the Horizon.

Q. With the Horizon.

From where to where, sir?

A. From New York to Bermuda, and in one occasion I returned with the Meridian, which was also taking the same trip one day later or earlier, I don't recall. But there were definitely three trips in the summer of 1990 that I took from New York to Bermuda.

MR. BRADY: Well, let me offer into evidence exhibit M. It's a copy of a check dated October 11, 1990, with various documents attached thereto.

MR. ROSENBERG: No objection.

[148] THE COURT: Exhibit M will be received.

(Defendants' Exhibit M received in evidence)

MR. BRADY: Thank you.

Q. Now, the first of the longer sheets attached thereto, which I believe is the third page, second page?

A. Yes.

Q. Is an expense sheet submitted by you for a period July 1 to July 31 of 1990, correct?

A. That's correct, sir.

Q. And on the first entry is July 13, transportation ride to LaGuardia?

A. That's correct.

Q. That's returning from your house to the airport to return to Miami, correct?

A. Transportation ride to LaGuardia, yes.

Q. July 14 is transportation to and from vessel?

A. To and from vessel, yes.

Q. Where would that have been?

A. In the Port of New York.

Q. So the first indication, then, was an error, that the trip was from LaGuardia to Rye?

A. It's reverse. It's reverse.

Q. And the last entry on this is July 19, taxi to St. George, correct?

A. Yes.

[149] Q. What was that? Can you explain that to us, please?

A. Yes, that means that this particular month I took at least one trip that I can see here, one of the vessels. I went to Bermuda with a vessel. I see the Horizon charge on top. It must be the Horizon. And then I charged here transportation from the one vessel to the other from St. George to the Meridian.

Q. All right.

A. By taxi.

Q. The Meridan was in St. George?

A. The Meridian or to Somerset. But I took a taxi from St. George.

Q. I mean – I am sorry – it should have said to St. George?

A. Probably. I returned to the Meridian to this ship because sometimes I went by ferry boat.

Q. So both the Horizon and Meridian at this time were sailing to Bermuda from the Port of New York?

A. Correct.

Q. On seven-day roundtrip cruises?

A. That's correct.

Q. And your testimony is what, how did you get to Hamilton?

A. The Horizon originally was going to Hamilton for [150] three days. From Hamilton, you would go to Somerset, where the Meridian is, by ferry boat, which was offered as a service by the company. So, of course, ourselves and the passenger could take that trip.

By that time, the Horizon shifted to St. George, which is the other end of the island.

Q. Right.

A. Quite a distance. And there was no ferry boat connecting these two ships any longer, so you had to take land transportation.

Q. So you took a taxi from there?

A. From Somerset to St. George.

Q. And in St. George you joined which ship?

A. The Horizon again.

Q. Where did she go from there?

A. She returned to New York.

Q. And when would she have returned to New York, what day?

A. The 19th, if that was the last day she was going to be in St. George?

A. I would guess it would be the day before, because she was sailing early in the morning. If she sailed on the 20th, two days later she would be back in New York.

Q. So she was back in New York July 22?

A. That is correct.

[151] Q. There's no indication of a return to the airport or from the ship to your house on July 22?

A. There is none, no.

Q. Can you explain that?

A. I could have been given a ride by the port captain.

Q. The port captain to where?

A. The Port of New York.

Q. To where?

A. To my home or to the train.

Q. Well, I want you to tell me, sir. I don't know. I wasn't there.

A. I don't recall, sir.

Q. You don't recall?

A. No.

Q. And was there a point during July when you returned to Miami?

A. From what –

Q. Well, I'm asking your recollection.

A. It must have been, yes.

Q. It must have been. Is there any evidence on here of how you returned to Miami?

A. No.

Q. There's no taxi fare going back to the airport in Miami, is there?

[152] A. No, there's not.

Q. Going back to LaGuardia?

A. No.

Q. How about in August of 1990, do you have any recollection of attending ships in August of 1990 outside of Miami?

A. Well, now I'm looking at the sheet, sir. My recollection –

Q. That's the other sheet attached to the same exhibit, yes.

A. I see there's attendance charge – I don't remember by heart the dates.

Q. Okay, that's fine.

A. Excuse me, you know, if I don't recall three or four years back.

Q. That's perfectly understandable. I just wanted to start there to see what you do remember.

A. On August 8, it was an attendance transportation in New York, and that's again the Horizon. And obviously I took another trip, because there's also transcription in St. George.

Q. Well, transportation to H?

A. To and from St. George, it says there.

Q. I'm sorry, it looks to me like it reads transportation from H to St. George on the second line.

[153] A. From Horizon to St. George, yes.

Q. Or could be from Hamilton to St. George?

A. Yeah, could be Hamilton. H, yeah.

Q. And then the next entry is August 24, transportation from LaGuardia?

A. Then there's transportation from LaGuardia, yes.

Q. Which indicates a trip from Miami back to home; is that correct?

A. That is correct.

Q. And August 25, you attended a ship again in the Port of New York?

A. Yes.

Q. So that's two attendances in the Port of New York, and you believe a sailing to Bermuda?

A. No, I believe it's definitely if I have a receipt from Bermuda, sir.

Q. You have a taxi receipt that you were in Bermuda, yes, but it doesn't indicate whether you sailed both directions or only one direction?

A. No, it does not.

Q. And the last entry in the July expense sheet indicates that you were back in New York, I believe, from our discussion, you were back in New York about July 22, correct, returning from Bermuda, by your testimony?

A. On the previous sheet, yes.

[154] Q. Right. And the first entry in August was attendance, August 4?

A. That's correct.

Q. And that's coming from your home in Rye, isn't it?

A. That's correct.

Q. And there's no indication that you went back to Miami in the interim between July 22 and beginning of August?

A. No.

Q. Was that vacations time?

A. I don't remember. It could have been a trip, too.

Q. Could have been a trip. There's no indication –

A. On board of one of the ships.

Q. There's indication of that on the documentation, is there?

A. No, it's not.

Q. What about September of 1990?

A. September 1990?

Q. Do you recall attending any ships outside the Miami area at that time?

A. Not readily, no.

Q. How about October of 1990, do you have any recollection about attending ships then?

[155] A. October dry dock, must have dry docked the ship. Not with dates and everything, I cannot tell you.

Q. Well, let's back up, then, and I would like to show you an exhibit O, which is a copy dated November 2, 1990, various documents attached thereto.

THE COURT: Mr. Rosenberg?

MR. ROSENBERG: No objection.

THE COURT: Exhibit O will be received.

(Defendants' Exhibit O received in evidence)

Q. Now, again, there's a long form expense sheet attached to exhibit O, correct?

A. That is correct.

Q. And it's covering the period of September 1990?

A. That is correct, sir.

Q. And if I'm correct, it indicates an attendance aboard a ship apparently in the Port of New York on September 1 of 1990?

A. Correct.

Q. And again on September 29 of 1990?

A. September 29, yes.

Q. Okay. And no others, correct?

A. Several others.

Q. Well, please show me where they are.

A. 21.

Q. September 4 is Rye back to LaGuardia Airport, [156] right?

A. Right.

Q. And September 4 also is?

A. LaGuardia Airport.

Q. Airport to residence, so you're back at Miami.

On September 21, residence to Miami airport, taxi fare?

A. Yes.

Q. And on September 22, LaGuardia Airport to Rye, New York. That's back to your home, correct?

A. Yes.

Q. And on the 29th, transportation for attendance, $30. That's the usual indication for a visit in the Port of New York, correct?

A. But there's a week lag in between there.

Q. Wherein there's no indication of any trips?

A. 21st – not on this sheet, but –

Q. Well, you arrived back in Miami on September 4, and on September 21, you go back to your home. There's no indication that you went from your home to the ship before the 29th, is there?

A. I'd like to repeat what I told you before, that I could not charge the company expenses that were relating to my visiting my home, sir. The expenses I could charge, I could get away with in that company was only where I had to [157] attend a ship the next day.

Q. Fine.

A. I'm sorry. And that's why it's charged to the ship on top. This was for the internal accounting system.

Q. On September 22, you went from LaGuardia to your home in Rye?

A. Correct.

Q. And there's no indication of traveling from Rye to the ship before the 29th?

A. There's nothing that I charged them, no.

Q. You would have gone from the ship, from your home to the ship and not charged them, wouldn't that be a reimbursable expense?

A. Yes, but it is a possibility that I charged – I did not charge it.

Q. Uh-huh.

A. I don't remember readily now to tell you. But whatever is chargeable to the ship, it is charged for the ship.

Q. Let's say that you're right, that you did go on the ship on September, that would have been the 23rd, the next day after you got back to New York?

A. Yes.

Q. Why would you have had to travel to the ship on the 29th for attendance?

[158] A. Because one scenario is that when one ship came back from a trip, the next day was the other ship.

Q. But you were already there. If you were on a seven-day roundtrip cruise to Bermuda that left on September 23, you wouldn't be back until September 30, would you?

A. September 29, 9 days. September 29, yes.

Q. September 22 you came into the LaGuardia Airport from Miami and went to your house in Rye?

A. Right.

Q. You didn't go to a ship that day?

A. No, I did not from what it looks like here.

Q. You're speculating that perhaps you went on a ship on September 23rd; that's not indicated on here, correct?

A. That's not indicated on here, that's correct.

Q. And if you had been on that ship, it was a seven-day cruise to Bermuda, correct?

A. Yes.

Q. And the ship would not have been back in New York until September 30, correct?

A. Yes, but sometimes I did not –

Q. So you could not have attended a ship.

MR. ROSENBERG: Your Honor, please, may the witness be permitted to answer?

THE COURT: Stop. The court reporter can't take [159] it down if all of us are talking at the same time.

Let's let the witness answer and then start with a question. Have you finished your answer, sir?

THE WITNESS: No, ma'am.

THE COURT: Would you please do so?

A. I was about to explain that sometimes we took a trip and we were not allowed to stay the whole roundtrip if there was an urgency. So we were asked to fly back either to Miami or to New York – it happened several times – and attend another vessel.

Q. And in that case –

A. That could be. I'm not saying that it is. But when you don't see several intervals of seven days, that happened. In fact, I was asked to return from Bermuda on occasion directly to Miami.

Q. Yes, on that case, if you had been asked to return from Bermuda to Miami, there would be some indication of travel back to New York, wouldn't there?

MR. ROSENBERG: New York?

THE COURT: Miami.

Q. He said he went to Miami.

A. I said on occasion I was asked to directly either to return to New York or to return to Miami, depending on what the urgency was.

Q. I understand.

[160] A. So it was not complete seven-day intervals.

Q. Fine. So if you had gotten off the ship from September 23 and September 29 in Bermuda and gone

back to Miami, then there would be some indication you came back to New York before you attended the ship on the 29th, wouldn't there?

A. That's a correct observation, yes.

Q. And there is no such indication on this document, is there?

A. No, there's not.

Q. Thank you.

Let's turn our attention now to October of 1990.

MR. BRADY: I'd like to offer into evidence exhibit Q, which is a copy of the check dated December 31, 1990, and various documents attached thereto.

MR. ROSENBERG: No objection.

THE COURT: Q will be received.

(Defendants' Exhibit Q received in evidence)

THE COURT: Question, sir?

Q. I refer your attention, Mr. Latsis, to the long sheet attached, first long sheet attached, which is again an expense report prepared by you covering the period of October 1990, correct?

A. That is correct.

Q. And that indicates trips to ships on October 6, [161] October 13 and October 27, correct?

A. The 6th I see, yes, the 13th, visit to the vessel, transportation, yes, 26th.

Q. 27th, I believe?

A. 27, yes. 26th is to the airport. 27th is to the ship.

Q. Right.

A. 27th I stayed and went to the New York office.

Q. And there's no indications that you are sailing on any of those ships; is that correct?

A. Not in this log, not in this expense account, no.

Q. And then in November of 1990, the last month of your employment with Chandris, did you make any trips to ships outside the Miami area?

A. I don't recall, but I know that on the 22nd I came back to New York.

Q. 22nd of November?

A. Yeah, to stay.

Q. That was the end of your employment there?

A. Yes. Without an expense account, you know, copy, which I don't have, I don't recall if I made the trip. I know I attended all the ships that was in Fort Lauderdale.

Q. I'm talking about outside Miami.

A. I don't recall.

Q. You don't recall?

[162] A. It could have been one more trip, but I'm not sure.

Q. When you came back to New York on the 22nd of November, that was not in connection with a visit to a ship?

A. 22nd of November, no.

Q. Now, I'd like to go back over your testimony about May 14 of 1989.

MR. ROSENBERG: May we approach, your Honor?

(At side bar)

MR. ROSENBERG: I would like to take a five-minute minute break.

THE COURT: Go ahead. Keep on going.

(In open court)

THE COURT: Proceed, please.

Q. I believe you testified that you first noticed a problem with your eye at about noontime that day?

A. About noontime, yes.

Q. The vessel was still in port at that time, wasn't it?

A. She was, yes.

Q. Did you have any pain at that time?

A. No pain, sir.

Q. Did you seek medical attention at that time?

A. No, I did not.

Q. You didn't go see Dr. Gonzalez?

[163] A. No, I did not.

Q. Did you know Dr. Gonzalez before you got on the ship?

A. I had met him in passing.

Q. Okay.

A. But not know him per se.

Q. In your duties attending the ships when they were in port, did you have occasion to come into contact with the ship's physicians on other ships at other times?

A. Regularly it was not required for my visits on board, but they came to the captain's office, to the chief engineer's to submit reports, so I saw from the insignia on the lapel on their shoulders.

Q. Did you know anything about Dr. Gonzalez' medical qualifications at that time?

A. No, sir.

Q. And I believe that you testified that you had no out-of-pocket expenses in connection with this incident; is that correct?

A. That is correct.

Q. And you lost no earnings while you were recuperating?

A. That is also correct.

Q. Now, in regard to the income you made the year after you left Chandris, I believe your testimony today was [164] that you made, was it $39,000, $39,874 in 1991?

A. Yes, sir.

Q. And do you recall being asked at your deposition what your income was in 1991?

A. I said about roughly about 70,000, I recall.

Q. You do recall being asked the question?

A. Yes, I do.

Q. I'd like to refer to page 119 of the deposition transcript, line 24, going to page 120, line 3, ask you if you recall being asked this question and giving this answer.

MR. ROSENBERG: Starting?

MR. BRADY: Line 24, at the bottom of 119.

Q. "Q. Can you tell me, then, what your yearly income was for 1991?

"A. 1991, the gross was 123,000, I think, and after expenses something like 79."

Do you recall being asked that question and giving that answer?

A. I was asked the question. I don't remember that I told you 12. I don't recall now. I thought I told you about 70 as income mixed between the corporation and the other one.

Q. Well, you did have a chance to read the transcript after the deposition was taken?

A. Yes. I don't recall the exact number I gave you [165] back.

Q. I'm asking you now. Do you have any reason to believe that what's printed here in the transcript wasn't what was said on that day?

A. No, it was reviewed and it's correct. If it's in the transcript, that's correct.

THE COURT: Gentlemen, let's try to be careful to speak one at a time. It's late in the day. The court reporter has worked very hard with that. Give her a break.

Q. Mr. Latsis, your consulting business that you're working in now, do you do the same kind of work now that you did for Chandris, generally?

A. Part of the work I do now is similar to what I did for Chandris. Some other part, I would say 50 percent, is not.

Q. And in what way is it different?

A. It's different that I inspect ships for purchase, write extensive reports, I review records of ships in different specifications, I do surveys for other classifications as though I was surveyor from the site of the classification.

Q. Okay. Anything else?

A. And some part is what I was doing for Chandris, conversions, repairs for the independent owners.

Q. And the estimates that you gave earlier about the [166] value of the benefits that you had received while you were at Chandris that you are not receiving now, those are your estimates, correct?

A. They are, yes.

Q. Now, when you went back to Chandris after the operation in July of 1989, did you make any complaints to Mr. Kapparis, Kaparis?

A. Yes, Kaparis.

Q. About your treatment or about your eye?

A. No, I didn't see any point to it.

Q. Well, I'm just asking you whether you did it or not.

A. No, I did not.

Q. And did you have occasion to see Dr. Gonzalez thereafter?

A. I met with Dr. Gonzalez again when we were traveling for Germany.

Q. Isn't it true that Dr. Gonzalez was with you in Germany for the entire time of the conversion?

A. That is so.

Q. And that he was the doctor assigned to that project?

A. Correct.

Q. And did you ever make any complaints to Dr. Gonzalez about his treatment of you while you were in [167] Germany?

A. No, I did not.

Q. At any other time?

A. No.

Q. And it's true, isn't it, that Dr. Gonzalez is not a defendant here?

A. No, that's not, as far as I know, is he?

Q. Did you ever sue the man anywhere else? Have you ever brought another lawsuit against Dr. Gonzalez?

A. No, I have not.

MR. BRADY: Thank you. No further questions.

THE COURT: Mr. Rosenberg, redirect, sir, if any?

MR. ROSENBERG: I'll be very brief, your Honor.

THE COURT: Terrific.

REDIRECT EXAMINATION

BY MR. ROSENBERG:

Q. Your estimates of gross income, sir, that were given in your deposition, did you take into account expenses when you ascertained gross income?

A. No, the way I gave that estimate was totally unprepared. I didn't expect the question. I remember 123 from my corporate total gross that I had given my accountant about, and I said that number and I quickly estimated it would be 70, but unfortunately it was not.

Q. The expenses associated with procuring that 15, [168] $123,000 in income, what were the expenses like?

A. Oh, nearly 115,000.

Q. What did they consist of?

A. They consisted of first purchasing the equipment we furnished to the Maritime Administration ships; second, hiring subcontractors to install and put into operation; and also I had two or three other consultants that I was cooperating with in obtaining appropriate equipment and testing it to the satisfaction of the administration.

Q. You were asked about whether you had any voiced any complaints with respect to the care that was afforded to you in connection with your eye treatment or consultation or visit of Dr. Gonzalez. Did any of the company officials ever bring that to your attention and ask you about it?

A. Would you repeat the question?

Q. Did any of the company officials that were referred to by Mr. Brady bring to your attention the visit to Dr. Gonzalez before your visit to the hospital in Bermuda?

A. They did not.

Q. With respect to the attitude of these officers of the company, did it change at all after your surgery?

A. It definitely did.

Q. In what respect?

A. I felt that they were – I was distanced from [169] them. Before the operation, they behaved as though there was a lot of projects for me in the company. They had big plans. I was named the head of –

MR. BRADY: Objection, your Honor. This is outside the scope of the cross-examination.

MR. ROSENBERG: Precisely on point, your Honor.

THE COURT: Approach, please.

(At side bar)

THE COURT: How is the attitude within the scope of the cross?

MR. ROSENBERG: He asked conversation – I want to complete the –

THE COURT: Wait. Wait. One at a time.

MR. ROSENBERG: Communication. In other words, he asked if there were spoken words with respect to this issue. I want to know whether there were other means of communication that were conveyed to Mr. Latsis. Mr. Brady asked if he made any complaints to them.

MR. BRADY: I didn't ask anything about what they said to him.

MR. ROSENBERG: It's a two-way communication.

MR. BRADY: No, it's not. The question is whether or not the man made any complaints to his employer, if there was complaint before the suit of improper treatment, and the answer was there wasn't. It has nothing [170] to do with their attitude toward him.

THE COURT: I really think it is beyond the scope.

MR. ROSENBERG: May I have permission, then, to go into this issue then >

THE COURT: No. Go ahead and finish up your redirect, please.

(In open court)

THE COURT: Ladies and gentlemen, the answer which you heard in response to the last question will be stricken from the record and will not constitute evidence for your consideration.

Q. The invoices that are, if they call them that, attached to which expense vouchers that constitute the exhibits that you have been questioned about, letters Q, O, M, N, K, J, I, G, F and D, were these designed to account for your activities with respect to visiting the various company vessels?

A. No, they were not, sir.

Q. What was the purpose of these?

A. Whenever I incurred out-of-pocket expenses that the company felt that they were justified, I was supposed to submit them in a format originally of my own. They didn't have a form. Eventually, they formalized this to their own – to suit their own accounting system.

[171] Q. Did the company keep an account of your visits to the vessel as far as you know?

A. As far as I know, no.

Q. And did you keep such an account?

A. No, I did not.

Q. Was it necessary in terms of performing your job as far as you were concerned?

A. It was not required. I kept only small reports of my visits, and if there were any conclusions, which there were, I kept them in a file in their office, which I left behind, because it was their property.

Q. At the time of your training, you indicated in direct examination in Merchant Marine training you were issued licenses, various kinds of licenses?

A. Correct.

Q. Do you keep those licenses current?

A. No, I have not, but in Greece the licenses are, as long as you have your health and you can submit to a physical examination of preboarding the ship, they are for lifetime.

Q. Have you preboarded and submitted to examinations with respect to those licenses since –

A. I did not make a use of any of the licenses since I left the Merchant Marine.

Q. That was many years ago?

[172] A. That was 1967.

Q. Thank you.

MR. ROSENBERG: No further questions.

MR. BRADY: No recross.

THE COURT: Any recross?

MR. BRADY: None, your Honor.

THE COURT: Thank you, Mr. Latsis. You may step down, sir.

(Witness excused)

THE COURT: How long is the deposition going to take, sir? Is that what you had in mind next?

MR. ROSENBERG: Yes, your Honor.

THE COURT: How long will that take, sir?

MR. ROSENBERG: I think maybe we can do it by 4:30, a little less. Do you want to defer that until tomorrow morning when we're all fresh, especially the reporter?

THE COURT: Off the record, please.

(A discussion was had at side bar off the record)

(In open court)

THE COURT: Ladies and gentlemen, in order, we hope, to shorten the process, the lawyers are going to go home tonight and shorten everything so that they have less deposition to read to you tomorrow. For that reason, we are going to let you go now.

[173] Would you be kind enough to come in tomorrow morning to be here ready to roll at 10 o'clock, as I'm sure the lawyers and their witnesses will be.

I caution you again: Please don't discuss the case with anyone else. Have a nice evening. I don't think you're going to get rained on.

(Adjourned at 4:05 p.m., until 10:00 a.m. on Wednesday, June 9, 1993)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIOS LATSIS,

Plaintiff,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and TRANSOCEANIC SHIPPING CO., LTD.,

Defendants.

91 Civ. 6900 (LMM)

TRANSCRIPT OF PROCEEDINGS
TESTIMONY OF DEMETRIOS KAPARIS

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[286] * * *

MR BRADY: At this time, you Honor, the defendants call Mr. Demetrios Kaparis to the stand.

DEMETRIOS KAPARIS,

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BRADY:

[287] Q. What is your occupation?

A. I am a senior vice-president and head of the technical department and technical operations of the Celebrity Cruises.

Q. What are your duties as director of technical operations?

A. I supervise entirely all maintenance, repairs, dry dockings, specifications and normal performance of our cruise ships. I rebuild, reconstruct and convert existing ships and I design and follow up the construction of new buildings and new superliners.

Q. How long have you been working for Celebrity Cruises, Inc.?

A. Since January 1993.

Q. Prior to January 1993, what was your occupation?

A. Exactly the same.

Q. Who were you working for then?

A. For Chandris, Inc.

Q. Can you tell us the relationship between Chandris, Inc. and Celebrity Cruises, Inc.?

A. Celebrity Cruises took over all the operations of Chandris, Inc.

Q. What were your duties for Chandris, Inc.?

A. What my duties are?

Q. Yes.

[288] A. Exactly the same as Celebrity Cruises.

Q. How long did you work for Chandris, Inc. before January 1993?

A. 33 years.

Q. What degrees do you hold?

A. I hold a Bachelor of Science of naval architecture, Bachelor of Science of naval engineering, and marine engineering, diploma of industrial administration from Manchester University from England. I have honor scholarship for 2 years to obtain a Ph.D. at MIT but I have never executed it, and I represent my company in the cruise industry in all conferences in Washington, in the United States Coast Guard headquarters, and also in the United States Public Health and Sanitation.

Q. Have you ever testified previously?

A. I never been. This is my first time.

THE COURT: Welcome.

Q. I would like to ask you some questions about the plaintiff in this case. Do you know Antonio Latsis?

A. Yes, I do.

Q. When did you first meet him?

A. In 1988 in Miami.

Q. About what time in 1988, do you recall?

A. I think it was spring 1988.

Q. How did you happen to meet him at that time?

[289] A. The senior vice-president of finance, Mr. Kapatanoukos, brought him in my office in Miami.

Q. What purpose was that meeting for?

A. In order to interview him for a job in my department.

Q. What was the result of that interview?

A. He was appointed as a consultant at the beginning and then he start working in my department from January 1989.

Q. What did you hire Mr. Latsis to do?

A. He was hired as a superintendent engineer but with a specific work to be done and supervise the electronic systems of our ships. And also to upgrade the computerized systems and the computerized communication between the ships and our office.

Q. Where did you hire him?

A. In Miami.

Q. Where was he expected to work?

A. In the Miami office.

Q. Did he have his own office there in Miami?

A. Yes, next to my office in my department.

Q. Where did Mr. Latsis live while he worked for you?

A. In New York.

Q. Aside from New York, what was he doing, do you [290] know, for accommodations in Miami?

A. He has rented an apartment.

Q. How far away was that apartment from the office, if you recall?

A. About two and a half miles.

Q. Do you know how he got back and forth between his apartment and the office?

A. By car leased by the company to Mr. Latsis.

Q. How many superintendent engineers were in your department in 1989?

A. Five. Two in Miami and three in Greece.

Q. In addition to the superintendent engineers and yourself, what other personnel are in the technical operations department of Chandris, Inc. at that time?

A. Two secretaries.

Q. Any other technical personnel?

A. In the Miami office, no.

Q. I mean in Chandris, Inc.

A. Yes, of course. All the engineering department of its ships and the masters of the ships reported to me for technical matters.

Q. How many licensed engineers were carried aboard passenger ships in 1989?

A. Depending on the size of the ship, between 12 and 14.

[291] Q. And how many ships were you supervising at that time?

A. Six.

Q. How many of those shipboard engineering personnel had offices in the Miami complex?

A. None.

Q. What type of ships were these?

A. All passenger cruising ships.

Q. What ports would those ships customarily call in?

A. New York, Boston, Philadelphia, Baltimore, Charleston, Wilmington, Miami, and San Juan,* Puerto Rico.

Q. How often were those ships in their home port in 1989?

A. Approximately about 7 days and occasionally every 2 or 5 days.

Q. When you say approximately, you mean approximately every seventh day?

A. Yes.

Q. How long would a ship typically be in port when it came in?

A. Depending on the itinerary between 9 and 14 hours.

Q. What kinds of maintenance problems arose with those ships in the course of your supervision of them?

A. We faced engineering problems, electrical [292] problems, plumbing problems and anything in relation to the technical and technical operations on the ships.

Q. How would you handle those problems when they arose?

A. I have appointed for each ship a superintendent engineer which is completely responsible and he is reporting to me direct.

Q. What would be the procedure if there was a problem with a ship that was assigned to one of those superintendent engineers?

A. First of all, the engineering department of the ships headed by the chief engineer is attending to the problem and if it is necessary I will have to send one of my superintendent engineers on board the ship.

Q. In that system that you had in 1989, how many ships were assigned to Mr. Latsis?

A. None.

Q. Why was that?

A. Because he was taking care of the electronic systems of the ships.

Q. And that was covering the whole fleet rather that one individual ship, is that correct?

A. Yes, sir.

Q. Approximately how often did it occur that it was necessary to send a superintendent to the vessel?

[293] A. During 1989 rarely.

Q. And if that happened what days of the week would such visits usually occur on?

A. Usually the ships are in port, we call home port, Friday, Saturday, Sunday, and Monday.

Q. And so that is when those visits would take place?

A. Yes, sir.

Q. At the vessel's home port?

A. Yes.

Q. What were Mr. Latsis' duties in the office during the week?

A. During the week he was taking care of all the electronic equipment of the vessels, checking the accounts and together with me arranging for the repairs if it was necessary or improvements.

Q. And who did Mr. Latsis report to?

A. To me.

Q. How long do these visits to the ship when they occur, how long do they usually take?

A. If it is the ship in the vicinity of Miami, Port Everglades, or San Juan, Puerto Rico, every week I used to send the responsible engineer.

Q. How often, to the best of your recollection, in 1989 and '90 did you send Mr. Latsis to visit one of the [294] ships in Miami?

A. Very rarely.

Q. Can you recall any specific number of times?

A. I can't remember exactly how many times.

Q. Less often than the other superintendents or more?

A. Yes –

MR. ROSENBERG: Objection.

THE COURT: When the lawyers object we have to wait to see whether or not you will be permitted to answer the questions.

MR. ROSENBERG: The witness previously indicated he didn't remember.

THE COURT: We all know that he is entitled to see if he can refresh him. Overruled.

A. Can you repeat it please.

(Question read)

A. Far less often. Far less than the other superintendents.

Q. Did you make such visits yourself in 1989?

A. Yes.

Q. How often?

A. On the ships in Miami I always attended the ships in Port Everglades and every 2 weeks in San Juan.

[295] Q. Was it normal procedure for superintendent engineers to sail with the vessels in 1989?

A. Not at all.

Q. Was it possible that that could happen?

A. In case we have a problem on an emergency, yes.

Q. And do you recall in your recollection Mr. Latsis doing that?

A. Yes, sometimes he did.

Q. Do you recall how frequently that occurred?

A. Not very frequently.

Q. Were any records maintained of a superintendent engineer's visits to the vessels?

A. No.

Q. In your position as his immediate superior, were you in a position to know if a superintendent engineer visited one of the vessels in its home port?

MR. ROSENBERG: Objection, your Honor. That could be all encompassing. We don't know the basis of what his answer would be. Would he know by means of personal knowledge, hearsay statement, or a record?

THE COURT: We obviously don't know all the details but is there a reason why this question shouldn't be asked?

MR ROSENBERG: We should know the basis of the answer before we hear the answer.

[296] THE COURT: If the answer is he doesn't know we won't have a basis. Overruled. Are you able to answer?

A. Yes, I always did for its visits. All my assistant engineers do in the ships.

Q. In your estimate then what percentage of Mr. Latsis time while he worked for you was spent aboard ships?

MR. ROSENBERG: Objection to the form of the question.

MR. BRADY: It's a factual statement.

MR. ROSENBERG: In your estimate.

THE COURT: If you are able to speak with precision do so, otherwise estimate, sir. Overruled.

A. About 10 percent.

Q. I would like to call your attention now to May 14, 1989. Do you recall where you were on that date?

A. Yes, in the Port of Baltimore.

Q. What were you doing there?

A. I was on board the GALLILEO.

Q. What was your purpose in being aboard the GALLILEO?

A. As head of the technical department I have invited various shipyards from Europe to visit the GALLILEO and to show with my assistants exactly what we intend to do for conversion of the GALLILEO to the the MERIDIAN and also [297] to study with me various plans and answer their questions in order for me to decide in which shipyard will go for the conversion.

Q. Was anyone else with you at that time as part of your team?

A. Yes, Mr. Salvatore Amara who was directly responsible superintendent engineer for the GALLILEO, Mr. Antonios Latsis, and Mr. Waterly.

Q. Did you have any conversations with Mr. Latsis on that date?

A. You mean the 14th?

Q. Yes.

A. Yes, I asked for him in the morning and early in the afternoon but I could not find him and I met him on the departure on the bridge, when we departed from Baltimore on the way to Bermuda, about 5 p.m.

Q. What did you say to each other at that time?

A. That I was looking for him that morning, that we were very busy and I could not locate him.

Q. Did he say anything to you?

A. Yes, that he went ashore to telephone his wife for family reasons.

Q. Did you have occasion to speak to him later in the day?

A. Yes. I met him early in the evening about 7:30.

[298] Q. Did you have further conversation at that time?

A. Yes. He told me that with his team of the shipyard was doing very well but he is feeling rather having a little irritation in his eye.

Q. Did he say anything else at that time?

A. Yes, he thought that dust went into his eye when we were together in the bridge in the afternoon sailing from Baltimore.

Q. Did he discuss anything further about his eye with you at that time?

A. Not at that time.

Q. Did he mention Dr. Gonzalez?

A. No.

Q. What happened after that?

A. I met Mr. Latsis again about 9 o'clock in the restaurant that we all had dinner. He came rather late and he complained to me that shadows started interfering in his vision and that he must take it a little bit easier.

Q. Did you say anything to him?

A. Yes. I told him that it's better for him to rest and not to drink.

Q. What happened after that? What did he do after that?

A. After we finished the dinner I think he went to his cabin.

[299] Q. When did you next see him?

A. Next morning.

Q. Did you have a conversation with him then?

A. Yes. He told me that he had a peaceful night and that he is feeling quite well and will continue our work.

Q. And that was May 15 now?

A. Correct.

Q. Did you have any further conversations with him during the day on May 15?

A. Not until very late in the afternoon.

Q. What was the substance of that conversation?

A. We had a conference room that we had to exhibit our plans and he told me that he is rather concerned about the deterioration of his vision.

Q. Did you have any comment on that statement?

A. I told him as soon as we are in Bermuda we have to arrange with the best optician to see him and also that he must contact his doctor.

Q. When did the ship arrive in Bermuda?

A. As far as I remember about 11 o'clock at the pilot and alongside about 1:15, 1:30.

Q. For the jury sake, can you explain the difference between arriving at the pilots and arriving at the dock?

A. When we arrive to the island we have to stay outside and receive a pilot and then the pilot will guide [300] the captain and the officers through the channel or the narrows to the berth in that island.

In the case of Bermuda it's between two and a half to 2 hours from the distance from the pilot to the berth.

Q. What happened when you arrived at the dock?

A. Immediately I called the captain and the chief purser and I asked them to arrange with our agent, Mr. Latsis, to be taken ashore to give to him the best of their attendance and to take him to the best optician or to the best hospital in Bermuda.

Q. When did you next see Mr. Latsis after that discussion?

A. Later on that afternoon in the conference room he came and I stand up and I went to his direction and I

asked him what was the problem and he told me that he came to take his clothes but he has contacted his doctors in New York and probably he was going to be operated next Monday.

Q. Did you make any statement to him at that time?

A. That we will try to take the best possible care of him.

Q. What communication facilities were aboard that ship at that time?

A. At the time in the GALLILEO we had radio, telex, telefax, and satellite communication from shore to the ship.

[301] Q. Ship-to-shore phone?

A. Yes.

Q. Were those facilities working at that time?

A. Yes, sir.

Q. How do you know that?

A. Because all that morning a lot of telefaxes and telexes were exchanged between the various teams of the shipyards with the head offices in Europe.

Q. When did you next see Mr. Latsis after he got off the ship the last time?

A. During the night and during the morning through the medical team of the ship GALLILEO I was in contact for the progress of the operation and then in the afternoon about 4 p.m. I went to the hospital personally.

Q. What day was that?

A. That was on the 17th.

Q. Did you have a conversation with him at that time?

A. Mr. Latsis was just recovering from anesthesia and I think he understood that I was present and I stayed there until about 2 a.m.

Q. Did you have occasion to see him again in Bermuda after that?

A. Yes, of course. The ship sailed on the 18th at 5 o'clock and my agent took me personally to his room. The [302] agent and myself – the agent stayed with me about one hour and he left and then I stayed there until 1 o'clock in the morning and then I had to go to my hotel and catch the first flight to New York.

Q. Did you have any conversation with Mr. Latsis on May 18?

A. Yes. He told me that he was under pain, that he was a little restless and I also spoke with the doctors and the nurses of the hospital. I took cash for him if he needs it and he told me not to leave any money because he will use his cards but to make sure that all his expenses, hotels, doctors and hospitals are to be paid by us, and I did so prior to my departure.

Q. When did you next see him after Bermuda?

A. Sometime in July I think.

Q. Where was that?

A. In Miami.

Q. In the office?

A. Yes.

Q. Did you have any conversations with him between Bermuda and when he came back to the office?

A. Of course, very regularly.

Q. How were those conducted?

A. I was asking how is his condition and how he felt. He was very, very confident that the progress was [303] very satisfactory and he has never complained to me.

Q. Those were on the telephone, those conversations?

A. Of course, sir.

Q. After he came back to the office in 1989, did you have conversations with him then?

A. Yes, he stayed a few days and then as far as I remember he went for holidays in Greece.

Q. Did he make any complaint to you at any time about the treatment he received for his eye?

A. None.

Q. How long did he continue to work for Chandris after July 1989?

A. Until November 1990.

Q. And in that period of time how many complaints did he make to you about the treatment he received for his eye?

A. To me, none.

Q. And did there come a time when Mr. Latsis ceased to work for Chandris?

A. Can you repeat please.

Q. Did there come a time when Mr. Latsis was no longer working for Chandris?

A. Yes, after November '90.

Q. Do you remember how that came about?

A. Yes because our principal decided that –

[304] MR. ROSENBERG: Objection, your Honor. Principals decided he said, the content of that communication.

MR. BRADY: Again it's not submitted for the truth of what it contains but only for the fact that it occurred. There has to be some explanation of what happened.

MR. ROSENBERG: That might be true but I am not sure this witness is familiar with that directive.

THE COURT: You are not sure the witness is familiar with what?

MR. ROSENBERG: That directive. This is being elicited as the statements of another party, not the witness.

THE COURT: What about counsel's statements that these are not being submitted for the truth of those statements?

MR. ROSENBERG: Just that they occurred, I don't object on that basis as long as the jury is instructed these are not to be deemed truthful or they are not being offered for the truth.

THE COURT: The statements are coming in not for the truth of their content but otherwise.

Proceed, sir. Are you able to answer or do you need the question again?

[305] A. Can you please repeat.

Q. Tell me what you recall about how the termination of Mr. Latsis, his employment with Chandris, occurred.

A. Yes, I remember very well. I discussed the matter and I submitted it to the principals and the principals because of his performance, his personality, that he could not more or less communicate well with my assistants and to the fact mainly that he lived in New York they advised me to advise him that he has to stop employment with us.

MR. BRADY: No further questions.

CROSS EXAMINATION
BY MR. ROSENBERG:

Q. Good afternoon, Mr. Kaparis.

Although you have never testified as a witness before, I take it that before appearing as a witness here today, you had discussions with the owners of the Celebrity Lines, formerly the Chandris Lines concerning your court appearance here today, is that true?

A. No, sir, I didn't.

Q. You never discussed this with the management of the company?

A. The management told me to attend and to tell the truth and the facts, which I did.

Q. Who did you discuss the truth and the facts with?

[306] A. With my lawyers. They asked me certain questions.

Q. Is he the only one you have discussed this matter with?

A. Yes, sir.

Q. And was there any written communication between you and the management of the company concerning what you observed and saw on the course of the voyage of the GALLILEO beginning on the 14th of May 1989 and terminating on the 16th?

A. No.

Q. No writings?

A. No writings.

Q. Did you generate any writings concerning Mr. Latsis and his eye problems?

A. No, I can't recollect, no.

Q. Are you familiar with the bridge log of that vessel as it was being prepared and as it evolved during the course of the voyage?

A. Can you repeat please the question.

Q. Are you familiar with the bridge log kept on the GALLILEO?

A. No, only I say only as far as I remember in my recollection.

Q. Do you remember seeing anything in the bridge log [307] concerning any treatment by Dr. Gonzalez of any patient or any passenger or crewman on that day?

A. No.

Q. Was any such treatment recorded in the log?

A. No, because this is not my duties. That is the master's duty.

Q. Did you look at that log?

A. Not at all, sir.

Q. You never saw that log?

A. No.

Q. Would it be a responsibility of the master of that vessel to record the fact that Dr. Gonzalez treated people on board that ship?

A. Yes, on a daily basis or twice a day, a report from the hospital goes to the master.

Q. And you know that Mr. Latsis, he told you he visited Dr. Gonzalez on board ship, am I correct?

A. Yes. Apparently Mr. Gonzalez told me that in the evening of the 15th that Mr. Latsis has visited him.

Q. The doctor informed you of that?

A. Yes, in the afternoon accidentally he saw him about 11 o'clock at night.

Q. And that confirmed that he had been in fact seen in the ship's hospital by Dr. Gonzalez?

A. Yes, because Gonzalez told me that Mr. Latsis – [308] usually when I walk around I ask the doctors if he has any problems or what he is doing and he told me exactly that evening that Mr. Latsis has visited him.

Q. What you told us before is that the hospital he is in charge of reports to the captain so they can include in the ship's log information concerning treatment of passengers and crewmen by the hospital, that's correct, is it not?

A. Yes, in writing.

Q. And it was the duty of the man in charge, Dr. Gonzalez, to report that to the captain, is that correct?

A. What I am telling you now is that the report, it comes from the department. There is no necessity for the doctor to report to the captain. The nurse takes the log book, what people visited the hospital.

Q. The nurse does that?

A. Yes.

Q. But the nurse works under Dr. Ganzalez's supervision?

A. Yes.

Q. There should be an entry in the log concerning the treatment of Mr. Latsis, am I correct?

A. Not necessarily.

Q. You indicated earlier that the hospital report should include that information, am I correct?

[309] A. Yes, but sometimes –

MR. BRADY: Hospital report?

MR. ROSENBERG: The hospital report included in the log, yes.

A. Yes, it is an emotional situation. It depends on the judgment of Dr. Gonzalez.

Q. Did you look at the abstract log in evidence in this case, Exhibit A in this this case?

MR. BRADY: Objection. He said he didn't see the log.

MR. ROSENBERG: That is different than in the course of the preparation.

A. I have not seen –

THE COURT: Wait, one at a time.

Have you finished your answer, sir?

THE WITNESS: I can't say what exactly it means because in my department it has nothing to do with the medical department. I am not responsible. I am responsible for the technical and specially that voyage I was very busy. I had 36 people to take care of.

MR. ROSENBERG: May I ask the witness be provided with Exhibit A, the log abstract?

THE COURT: I will hand it to him as we speak.

(Continued on next page)

[310] Q. Mr. Kaparis, I'm going to call your attention to the contents of exhibit A, the abstract of the ship's log of the Galileo. I'm going to ask you to turn to the 14th, the entries beginning on the 14th –

MR. BRADY: Objection.

Q. – of May.

MR. BRADY: Your Honor, I'm going to object on the basis that there's no foundation that witness has ever seen this document before. I thought that's what he was being shown it for.

THE COURT: Is that where we are going? I mean the document says what it says.

MR. ROSENBERG: Understood.

THE COURT: And he'll be able to argue that.

MR. ROSENBERG: Understood. I'm going to ask him a question after he's had an opportunity to look at it.

A. We are going to look, sir.

MR. ROSENBERG: He has familiarity with these types of documents.

MR. BRADY: But not this document necessarily.

THE COURT: First why don't you find out if you have ever seen this document.

Q. Did Mr. Brady show you this document before –

THE COURT: Have you ever seen this document?

THE WITNESS: No, sir. No, I have not seen this [311] document.

Q. You haven't seen it. Would you take a look at the entries that were compiled from the 14th through the 16th of May?

A. Yes, sir.

Q. Now, Mr. Kaparis, after reviewing that abstract of the log of the Galileo for that period in time, can you tell us whether you inspected it and found that there were reports from the hospital concerning treatment of passengers and crew?

MR. BRADY: Objection. I mean, this is cumulative, your Honor. The document speaks for itself.

THE COURT: The document is there.

MR. BRADY: This witness has nothing to add.

THE COURT: Is there any other question you're going to ask him?

MR. ROSENBERRG: Sure.

THE COURT: What is the question?

Q. Is there any reference in there to Dr. Gonzalez seeing Mr. Latsis?

THE COURT: Whatever it says, it says.

A. No.

Q. You earlier indicated to us that in response to one of my questions, that important matters are reported by the hospital to the captain for inclusion in the ship's log, [312] is that correct?

A. Correct.

Q. And I take it, then, that since there's no reports of Mr. Latsis' situation, it was not regarded as important, is that correct?

MR. BRADY: Objection.

THE COURT: Mr. Kaparis, stop.

THE WITNESS: Can I answer this question?

THE COURT: No, sir. No, sir.

MR. BRADY: Your Honor, is that asking for this witness' opinion as to whether it was important, or somebody else's opinion as to whether it was important? There's no foundation for that.

THE COURT: Mr. Kaparis, would you let us straighten this question out –

THE WITNESS: Yes.

THE COURT: – before you answer, sir? And I will tell you if you may answer, okay?

THE WITNESS: Okay.

THE COURT: Thank you.

Are you asking what the doctor might have said to this witness, if anything, or are you asking for the witness' evaluation?

MR. ROSENBERG: Well, the witness has indicated to us a familiarity with the standard for reporting.

[313] THE COURT: The witness testified that it was in the doctor's judgment. Why are we asking this witness?

MR. ROSENBERG: I take it from the shake of his head he concedes that.

THE COURT: Stop. Stop with the shake of the head. What is the next question?

MR. ROSENBERG: I withdraw the question.

THE COURT: Thank you, sir.

Q. Now, Mr. Kaparis, do you know that Dr. Gonzalez prepared a request for medical treatment concerning Mr. Latsis for transmittal to the health authorities or the physicians or hospitals in Bermuda, have you seen that?

A. No, I have not seen it.

MR. ROSENBERG: May I ask that the witness be presented with exhibit 5, your Honor?

THE COURT: 5 is being placed before the witness.

Q. Mr. Kaparis, are you familiar with this type of form? Have you seen it before?

A. Yes, I have seen it.

Q. And –

A. Not this particular. I have seen the type.

Q. Yes, just the form itself without the contents of this particular one.

There appears to have three signatures at the [314] foot above the double bar. Do you see that?

A. Yes.

Q. One of them has been identified as the signature of the master of the vessel?

A. The master.

Q. The ship's purser and Dr. Gonzalez?

A. And Dr. Gonzalez, yes.

Q. Is this usual and customary for the Chandris Line at that time to furnish this type of document for the medical care of the crew when they are embarked in port and require medical attention?

MR. BRADY: Objection. There's no foundation that this witness is in a position to know that, your Honor. He's not responsible for the medical personnel.

THE COURT: Do you want to try to see if there is a basis?

Q. Are you familiar with the use of that form?

A. Yes, I'm familiar, but this is not necessarily to be done for any person. This is done for Mr. Latsis, and this is for the reason for our agents to pay the expenses.

Q. Is that usual and customary when a seaman is injured on board ship, requires medical attention, that he be directed to land-based facilities for treatment?

A. Yes, because they have to pay all the expenses and take the best care. And this, in this instance, it was [315] necessary to do this in order for the agent to pay the expenses for Mr. Latsis personally and also for the master to take very good care of Mr. Latsis.

THE COURT: Ladies and gentlemen, you will recall that questions are not evidence.

Q. After Mr. Latsis returned from his convalescence following his hospitalization, he was on leave for a while, am I correct?

A. I believe it was about six weeks at home.

Q. And at the conclusion of that period of time, he came back to Miami and he worked for a time and embarked on a trip to Greece?

A. Yes, he flew to Greece.

Q. Flew to Greece. And while in Greece, did he attend to any of the business of the company with regard to the –

A. Yes, he worked for two days in my office and he met, on my instructions, some of the subcontractors.

Q. And that was for the major reconstruction of the Galileo?

A. Correct.

Q. And –

A. And he called me from my office. He sat in my office in my – in my desk in my office in Piraievs.

Q. In the Port of Piraievs –

[316] A. Yes. We had an office there.

Q. – outside of Athens?

And at the conclusion of the holiday that he was enjoying with his family in Greece, he came back to work in Miami, did he not?

A. Yes, for a while. And on the 30th of September, together we departed on the Galileo from Philadelphia to Germany.

Q. So that the ship was in Philadelphia when it started the voyage to Germany?

A. Because it was cruising to Philadelphia as I explained, from New York, Baltimore.

Q. And you and he accompanied the crew of the vessel and other officials?

A. No, it was nearly three-quarters of my technical department on board.

Q. And all of you travel to the facilities in Germany where the conversion took place?

A. Correct.

Q. And did Mr. Latsis have any role to play concerning that project?

A. Yes, he assisted me on the, mainly on the electronic and electrical systems, on the telephone installations, and also, if he was very busy, I advised him to do some inspections for me.

[317] Q. And this project was over a very extended period, it was a major reconstruction, am I correct?

A. Yes, correct.

Q. I think there was testimony this was a $65 million job?

A. Correct.

Q. And the ship was actually being made and renamed at the conclusion?

A. Yes, sir. I did all the specifications and the designing and rebuilt the ship.

Q. And did Mr. Latsis remain in the course of that job working on that ship throughout the conversion process?

A. Yes, he remained, except Christmas he came for vacation. And also I have arranged for him to live in an apartment in Bremerhaven. He did not remain on board, while I stayed every single day.

Q. And at the conclusion of that conversion, did he accompany the ship back to the United States?

A. Yes, together with me.

Q. And he testified that the ship was – there was a shakedown crew, I think he characterized it?

A. No, I was on board.

Q. Understood. But I mean that was the purpose of that voyage?

A. Yes.

[318] Q. To ascertain whether any repairs needed –

A. No, sir, I ascertained. I am responsible, and he was working for me, Mr. Latsis.

Q. And he carried out your directions concerning –

A. Anything at my direction, yes.

Q. And he testified that, thereafter, the ship traveled to Norfolk and was put up in dry dock in Norfolk?

A. No, he didn't testify. That was testified by the American Bureau of Shipping and by myself and my principals. He has nothing to do with that problem.

Q. No, no.

A. Yes, you said –

Q. No, he testified. He told this Court and jury that he participated in that aspect.

A. No, no, no.

Q. He wasn't there?

A. He was there, but the decision to go to dry dock was between myself, my principals and the American Bureau of Shipping.

Q. Mr. Kaparis, I didn't ask you about the –

THE COURT: Mr. Rosenberg, I don't think Mr. Kaparis was here during that testimony.

MR. ROSENBERG: No, no, no. Understood.

THE COURT: Why don't we forget about he testified this, he testified that. There's no way he can [319] know.

MR. ROSENBERG: Understood.

Q. In any event, he accompanied the ship to Norfolk when it went into dry dock?

A. Of course, because we had certain items on the electronic side, and we tried to complete them in dry docking.

Q. As your subordinate, he carried out your responsibilities in terms of the electronics at your direction, am I correct?

A. Correct.

Q. And did he do so in a satisfactory manner as far as you were concerned?

A. Yes. The only problem was sometimes was his personality contrasted with my assistant's.

Q. And did you ever have any report in writing concerning that?

A. No.

Q. Had you been advised that Mr. Latsis corresponded with the management of the company concerning his future with the company?

A. No, I have never been advised.

Q. And after the dry docking in Norfolk, there were repairs that were undertaken during the course of that dry docking, am I correct?

[320] A. Correct.

Q. And –

A. Hull repairs.

Q. The ship was again floated, was it?

A. Yes, after four days.

Q. Was it inspected by the Coast Guard authorities at that time?

A. By everybody, and also Admiral Sipes from U.S. headquarters.

Q. Did Mr. Latsis help you participate in that inspection?

A. Not particularly, because Mr. Latsis was busy with electronic, because the problem with the dry dock has nothing to do electronic. It was mainly a hull problem.

Q. And the electronics were important to the functioning of the ship, I take it; is that correct?

A. Of course, yes.

Q. Very important?

A. That's why I appointed Mr. Latsis.

Q. And incidentally, you indicated to us that even before the conversion the Galileo was well equipped in terms of communication, am I correct?

A. Correct.

Q. And you indicated that there was a telex aboard; is that correct?

A. Correct.

Q. That you had connections with satellite communication?

A. Correct.

Q. That you had the ability to –

THE COURT: Are we going to do this over again? We did this –

MR. ROSENBERG: Understood.

THE COURT: – ten minutes ago. The jury is awake. They are listening.

Q. Were those facilities that you testified to –

A. Yes.

Q. – available for use in 1989 and May of 1989?

A. Yes.

Q. On May 14, 15 and 16 of 1989, were any of them undertaken for use to communicate with any physicians on land concerning the course of treatment that should be provided to Mr. Latsis regarding an emergency medical condition with his right eye, was that communication used in any way in that connection?

MR. BRADY: I'm objecting to the form of the question, your Honor.

THE COURT: You know better. Do it again.

Q. Did Dr. Gonzalez take advantage of the opportunity to use those communication facilities?

[322] A. Sir, I don't know. This was the responsibility of the master and Dr. Gonzalez.

Q. You don't know if any such communication –

A. No, sir.

Q. – was undertaken? You have never been advised of any, I take it?

A. No, sir.

Q. When did you last see Dr. Gonzalez?

A. Gonzalez, I saw him a few months ago on board the Zenith.

Q. And did you tell Mr. Gonzalez that you were going to testify in this case – Dr. Gonzalez, excuse me – Dr. Gonzalez that you were to testify in this case?

A. No, he came to me and told me that he is coming to the court case.

Q. He told you he was going to testify in this case?

A. Yes. Yes.

Q. Did he discuss with you what he had found on his examination of Mr. Latsis on board the ship in May of 1989?

A. Sir, I'm a very busy man. When I last saw him, Dr. Gonzalez, I only saw him for two minutes. I cannot discuss. He told me he's going to attend the court case, that's all.

Q. Did you ever discuss with him at any time –

A. No. No.

[323] Q. – between May 14 and the present time –

A. No, May 14 –

THE COURT: Mr. Kaparis, it's very difficult for the court reporter to take it down when two people are talking.

THE WITNESS: Okay.

THE COURT: Would you be kind enough to let counsel finish his question and then answer, please.

Q. I'll start again, okay? At any time between May 14, 1989 and today, did Dr. Gonzalez ever discuss with you his findings of the examination he conducted of Mr. Latsis on board the Galileo on that day?

A. No, sir.

MR. ROSENBERG: I have no further questions.

THE COURT: Thank you, sir. Redirect?

MR. BRADY: No, your Honor.

THE COURT: Thank you. Mr. Kaparis, you may step down, sir.

(Witness excused)

THE COURT: Ladies and gentlemen, I think this is a nice time for ten minutes to stretch and do what we need to do. See you then.

(Jury leaves courtroom)

(Recess)

[324] (In open court; jury not present)

THE COURT: Mr. Brady, do I hear this right?

MR. BRADY: My apologies, your Honor, yes.

THE COURT: You let the doctor go?

MR. BRADY: I let him go this morning. I didn't anticipate that this afternoon would move so efficiently.

THE COURT: All right. Let's let the jury go home.

(Jury enters courtroom)

THE COURT: Ladies and gentlemen, I think we have good news and good news. The good news – well, the bad news, from our point of view, is that counsel has run out of witnesses for the day. The good news for you is you get to go home. The good news also, I think, is that this will not affect our estimate that we will be concluded by Friday.

So the net net is you get a little time off this afternoon. Would you be kind enough to be back 10 o'clock tomorrow morning as promptly as you were today, please?

Good evening. Counsel apologizes for running out of witnesses.

(Jury leaves courtroom)

(Adjourned at 3:30 p.m., until 10:00 a.m. on Thursday, June 7, 1993)

CHANDRIS

CHANDRIS CRUISE LINES

s.s. "GALILEO" V6/89

PLAINTIFF'S EXHIBIT 5

Blumberg No. 6199

DR. MARCH
1430/16-05-89

KEMH.
ADMITTED PM/16-05-89
FOR EYE OPERATION.
@ KEMH.

TO:

MEYER AGENCY
35 CHURCH ST.
HAMILTON, BERMUDA

DATE. 14TH MAY 1989

REQUEST FOR MEDICAL TREATMENT

PHYSICIANS ARE KINDLY REQUESTED TO COMPLETE THIS FORM IN A CLEAR MANNER

NAME OF CREW MEMBER: LATSIS (SURNAME) ANTONIOS (CHRISTIAN NAME) POSITION SUPT. ENGINEER

REQUESTED. X-RAY [ ] YES [XXX] NO BLOOD TEST: [ ] YES [XXX] NO URINANALYIS TEST [ ] YES [XXX] NO

SHIP'S DOCTOR'S REMARKS: RULE OUT DETECTED RETINA PLEASE

MEDICAL DOCTOR: PLEASE EXAMINE THIS CREW MEMBER AND PROVIDE THE REQUESTED RESULTS IF X-RAY IS REQUESTED, DELIVERED THE X-RAY WITH THE READING TO THE CREW MEMBER TODAY OTHER TESTS SHOULD BE MADE AVAILABLE TO THE SHIP'S DOCTOR ON THE NEXT CALL IN PORT

EXPENSES FOR EYE-GLASSES, HEARING AIDS, CORSETS, ETC ARE TO BE PAID BY THE CREW MEMBER TO YOU. ONLY ABOVE REQUESTS WILL BE PAID BY CHANDRIS CRUISE LINES

DENTIST: ONLY X-RAYS AND EXTRACTIONS WILL BE PAID BY CHANDRIS CRUISE LINES FOR ANY OTHER DENTAL WORK, PAYMENT MUST BE COLLECTED FROM THE CREW MEMBER BY YOU

SIGNATURE OF MASTER	SIGNATURE OF CHIEF PURSER	SIGNATURE OF DOCTOR
CAPTAIN G. ANDRIANATOS	A. BELESSIOTIS	DR. V. GONZALEZ M.D.

PHYSICIAN'S REPORT ASHORE

DIAGNOSIS.....

X-RAY AND/OR LAB RESULTS:.....

PRESCRIPTIONS:.....
(IF SPECIAL MEDICINE REQUIRED, PLEASE PROVIDE TO CREW MEMBER

FURTHER RECOMMENDED TREATMENT:.....

DATE:..... 19.....
DOCTORS NAME AND ADDRESS DOCTOR'S SIGNATURE

1 COPY: DOCTOR ASHORE TO COMPLETE AND RETURN WITH CREW MEMBER TO SHIP
2 COPY: DOCTOR ASHORE TO COMPLETE AND RETURN WITH INVOICE TO ELLER & CO

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93-7704

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

ANTONIOS LATSIS,
Plaintiff-Appellant,

-against-

CHANDRIS, INC., CHANDRIS, S.A. and
TRANS OCEANIC SHIPPING CO., LTD.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

EXCERPT FROM JOINT APPENDIX A303-A305 – JURY CHARGE

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[511] Now let's talk a bit about the specific claims that are presented here.

The plaintiff, Antonios Latsis, brings this action against the defendants under the Jones Act. The Jones Act provides in substance that every employer whose employees are members of the crew of a vessel in navigation shall be liable in damages for injuries sustained by the employee as a result, in whole or in part, of the negligence of any of the employer's officers, agents or employees or from any defect or deficiency, due to its negligence, in the vessel, its crew or its equipment.

Before you find the the defendants liable to plaintiff under the Jones Act, the plaintiff must prove by a preponderance of the evidence four elements:

[512] First, that the plaintiff was a member of the crew of a vessel, acting in the course of his employment; that is, that he was a seaman; two, that the defendants were, or one of them, were plaintiff's employer; three, that the defendants or an officer, employee or agent of one of them was negligent; and four, that such negligence played a part, no matter how slight, in bringing about the injury to the plaintiff.

Now, as to element number one, that is, that plaintiff was a seaman, regarding this first element, you may find that plaintiff was a seaman if you find by a preponderance of the evidence two things:

First, that plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation. You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers.

The second thing required in proving seaman status is that plaintiff prove by a preponderance of the evidence that the capacity in which he was employed or the [513] duties he performed contributed to the function of the vessel or the accomplishment of the vessels' mission or to the operation or maintenance of the vessels during their

movements or while at anchor for the vessels' future trips.

The parties have agreed that the work of the plaintiff aboard these ships was a contribution to the functioning of the vessel and assisted in the accomplishment of its various missions.

So the parties have agreed that the second element involved in proving seaman status has been met.

In considering whether plaintiff has otherwise proved seaman status you should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer.

If you find by a preponderance of the evidence that plaintiff was indeed a seaman, then you will go on to consider the other elements of the Jones Act claim.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIOS LATSIS,	91 CIVIL 6900 (LAP)
Plaintiff,	**JUDGMENT**
-against-	**U.S. DISTRICT COURT S.D. OF N.Y.**
CHANDRIS, INC., CHANDRIS, S.A. and TRANS OCEANIC SHIPPING CO., LTD.,	(Filed Jun. 17, 1993)
Defendants.	

A Jury Trial before the Honorable LORETTA A. PRESKA, United States District Judge, having begun on June 8, 1993, during the trial the Court having reserved decision of defendants' motion to dismiss, thereafter the trial having continued, and at the conclusion of the trial the jury having answered the attached "Verdict Form," and the jury in so doing having returned a verdict in favor of defendants, and the Court directing the complaint be dismissed, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in its entirety.

DATED: NEW YORK, NEW YORK
June 14, 1993

JAMES M. PARKISON
Clerk
By: /s/ _____
Ronald A. Church
Deputy Clerk

APPROVED:
/s/ _____
Loretta A. Preska
U.S.D.J.

VERDICT FORM

1. Was Antonios Latsis a "seaman"?
   Yes _____ No X

If the answer to question number 1 is yes, continue on.

2. Were the defendants negligent in their treatment of plaintiff?
   Yes _____ No _____

If the answer to question number 2 is yes, continue on.

3. Was the defendants' negligence the proximate cause of plaintiff's injury?
   Yes _____ No _____

If the answer to question number 3 is yes, continue on.

4. If you have responded yes to all above questions then you must determine what damages, if any, plaintiff is entitled to.

   a. Compensation for lost earnings.
      Amount _____

   b. Compensation for past pain and suffering.
      Amount _____

   c. Compensation for future pain and suffering.
      Amount _____

5. Was plaintiff contributorily negligent in causing the injury?
   Yes _____ No _____

If the answer to question number 5 is yes, continue on.

6. Was plaintiff's negligence the proximate cause of his injury?
   Yes _____ No _____

If the answer to questions number 5 and 6 is yes, then answer question number 7. If the answer to either question number 5 or question number 6 is no, then return the verdict form.

7. What percentage of the entire injury was a result of plaintiff's contributory negligence?
   Percentage _____

8. Reduce the total amount of damages (4a+4b+4c) by the percentage of contributory negligence of plaintiff found in answer to question 7.
   Verdict for plaintiff in the sum of $ _____.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 735 – August Term, 1993

(Argued December 6, 1993 Decided March 24, 1994

Docket No. 93-7704

Antonios Latsis,

Plaintiff-Appellant,

v.

Chandris, Inc., Chandris, S.A., Trans Oceanic Shipping Co., Ltd.,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

(Filed Mar. 24, 1994)

GEORGE LANGE III, CLERK

Before OAKES, KEARSE and CARDAMONE, *Circuit Judges*.

Appeal from a judgment dismissing the complaint of Antonios Latsis who sought compensatory damages under the Jones Act for personal injuries he sustained while aboard a vessel in navigation. The jury found that Latsis was not a "seaman" and therefore returned a verdict in favor of defendants. We now hold that the jury instructions were erroneous and resulted in substantial prejudice to Latsis.

Remanded for retrial with jury instructions in accordance with this opinion. Judge Kearse dissents in a separate opinion.

Lewis Rosenberg, New York, NY
(Barry I. Levy, Shapiro, Shiff, Reilly, Rosenberg & Fox, of counsel), *for Plaintiff-Appellant.*

William J. Brady, III,
New York, NY
(Christ Stratakis, Poles, Tublin, Patestides & Stratakis, of counsel), *for Defendants-Appellees.*

OAKES, *Senior Circuit Judge:*

This case causes us to re-examine the definition of seaman as charged in Jones Act cases in light of two recent opinions of the Supreme Court: *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337 (1991), and *Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S. Ct. 486 (1991) (explicating *Wilander*). Specifically, we must determine whether an "employment related connection to a vessel in navigation" must be substantial either in terms of the plaintiff's "permanent assignment to the vessel" or "performance of a substantial part of his work on the vessel." A subsidiary question is whether the district court properly instructed the jury that it could not consider the period of time a vessel was in drydock in determining whether the plaintiff performed "a substantial part of his work on the vessel." We find that, although *Wilander* overrules the "aid to navigation" element of *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975), the "more or less permanent connection" requirement articulated in *Salgado* remains the law of this circuit. In ignoring this

formulation and adopting an alternative formulation, the district court misapplied the law and committed plain error. This error resulted in substantial prejudice to Latsis because the jury was effectively instructed to determine the substantiality of Latsis's connection to the vessel solely on the basis of Latsis's temporal relationship with the vessel. This prejudice was compounded by the district court's further instruction that the time the vessel was in drydock could not be considered – an instruction that improperly served to limit the substantiality of Latsis's connection to the vessel in terms of Latsis's temporal relationship with the vessel. We vacate the judgment of the United States District Court for the Southern District of New York, Loretta Preska, *Judge*, and remand for a new trial.

I. Background

A. Facts

Antonios Latsis brought this action under the Jones Act for compensatory damages for personal injuries sustained by Latsis culminating in the loss of sight to his right eye. These injuries allegedly resulted from the negligence of the ship's doctor who failed to treat promptly Latsis's detached retina. Latsis alleges that he sustained these injuries while employed as a "seaman" aboard a cruise ship then known as the S.S. Galileo, one of a fleet of cruise ships owned and operated by appellees Chandris, Inc., Chandris, S.A. and Trans Oceanic Shipping Co., Ltd. (hereinafter "Chandris").

The injuries are said to have resulted from medical malpractice by the ship's doctor on May 14, 1989, a

Sunday on which the Galileo took on passengers at Baltimore, Maryland, for a regularly-scheduled, round trip cruise of five days to Bermuda. Around noon of that Sunday, while the vessel was still in port, Latsis, on board and assigned to the Galileo in his capacity as a supervising engineer for Chandris, began experiencing a central visual disturbance which seemed to originate in the bottom portion of his eye. As the day progressed the obstruction to his vision expanded. Latsis did not appreciate the significance of the problem until the time approached to sail in the late afternoon, when he sought medical guidance from an on board nurse who advised him to see the ship's doctor at once. He did so as the ship pulled from the dock in the port of Baltimore. Once in the ship hospital, he consulted Dr. Gonzalez, the physician employed by Chandris for this vessel. Dr. Gonzalez looked at Latsis's eye through an ophthalmoscope and said it appeared to him to be a detached retina. Gonzalez recommended that Latsis relax until he could see an eye specialist when they arrived two days later in Bermuda. Latsis received no further medical care until after the ship arrived in Bermuda, and no attempt was made to transport him ashore for prompt medical care by means of a pilot vessel, helicopter, or otherwise. During this interval, the impairment of his vision continued to intensify until all central vision in the eye was lost.

The malpractice allegations relate to the fact that Dr. Gonzalez, unlicensed in any state in the United States, neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that " . . . any patient with a suspected or established retinal detachment should be seen on an emergency basis

by an ophthalmologist." When the vessel reached Bermuda, a doctor diagnosed his eye as having a massive detachment of the retina. The doctor recommended immediate hospitalization. After a consultation with Latsis's regular eye doctor in New York and another New York eye specialist, the doctors recommended surgical reattachment of the retina. Although Latsis underwent surgery, the end result was that he lost 75 percent of his central vision and can only see light on the sides of his right eye.

At the time Latsis presented himself for treatment in Bermuda, he was given a Chandris form signed by the ship's captain, chief purser, and Dr. Gonzalez, requesting medical attention be provided to Latsis for his "detected [sic, detached] retina" and describing Latsis as a "crew member" holding the "position" of "supt.engineer."

Evidence in the case indicated that Latsis, a naturalized American citizen of Greek ancestry, has had a lifelong involvement with the sea and shipping beginning with his entry into the Merchant Marine as a cadet in Germany following his graduation from high school, his sailing aboard a merchant ship as a second mate following successful completion of his studies and examinations, and finally with his being appointed captain of a small Mediterranean vessel. Thereafter, he became chief mate on a larger vessel. He came to the United States in 1967 and promptly became a United States citizen. He was employed in San Francisco with a firm of ship surveyors while continuing his education at the University of California at Berkeley. In 1973 he was awarded a Bachelor's Degree of Science and Mechanical Engineering from Berkeley and a year later received a Master's Degree

in Naval Architecture, working in the Maritime Industry during this time for the Pacific Marine Association in the ports of San Francisco and Oakland. After graduation he went to New York to work for the American Bureau of Shipping, and later for Southern Star Shipping Company as a superintendent and engineer. He supervised Southern Star's vessels' operations and maintenance for 11 years before becoming employed in 1989 by Chandris out of its Miami, Florida office.

Chandris operated a large fleet of merchant vessels, five of which sailed from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico. For the first three months, Latsis was employed as a consultant and thereafter became a salaried employee. His duties were not confined to any single vessel but ran to the whole fleet. Latsis's duties included not only overseeing the vessels' engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore. While he necessarily familiarized himself with all of the vessels' power plants and engineering functions, he attended several hands-on repairs in a supervising capacity and monitored problems that the ships had or could develop. He was particularly in charge of the electronic equipment, both retrofit and existing equipment.

Latsis's work required him to travel with various ships in the fleet from time to time. The evidence here was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent. Latsis maintained his family and residence in Rye, New York, although the

company provided him with housing and the use of a rental car in Miami because his office work was regularly there. The vessel on which he was sailing and with which he had more connection than any other vessel in the fleet was the 27-year-old S.S. Galileo, as it was then known, aboard which he had sailed from Miami to Mexico with specialists from Germany to plan for a conversion and upgrading scheduled to take place in Germany in the following year. He helped draw specifications to keep the older ship in repair while sailing on its cruise routes to Mexico and Nassau in the Bahamas. In fact, he had been on board the Galileo at the conclusion of a regular two-day cruise originating from and returning to Baltimore, having joined the ship there on Friday, March 12, two days before the scheduled trip to Bermuda during which his eye injury occurred as above stated. On the Baltimore-Bermuda trip, Latsis was responsible for escorting various shipyard personnel around the ship in connection with the upcoming conversion of the vessel. In fact, he was busy with these people after he first noticed the problem with the vision in his right eye at about noon on Sunday, May 14, up until the time of sailing when he finally went to see the ship's nurse who sent him to Dr. Gonzalez.

According to Demetrius Kaparis, who was a senior vice president of Chandris, Inc. and head of its technical department and technical operations before it was taken over by Celebrity Cruises, Inc., Latsis was hired on a regular basis as a superintendent/engineer with the specific work of supervising the electronic systems of their ships and also upgrading the computerized systems and the computerized communication between the ships and

the Chandris Miami office. The company had five superintendent/engineers, two in Miami and three in Greece, and all of the engineering department of the ships and masters of the ships reported to Kaparis for technical matters. The Chandris vessels, depending upon size, carried between 12 and 14 licensed engineers on board, and Kaparis supervised six vessels, all passenger cruising ships customarily calling in at New York, Boston, Philadelphia, Baltimore, Charleston, Wilmington, Miami, and San Juan. Usually, a vessel would be in home port about every seven days. Occasionally, depending on her itinerary, the ship would return to home port after a two or five day cruise. Vessels were usually in home port between 9 and 14 hours. Each ship had a superintendent/engineer, completely responsible, who reported to Kaparis directly. No vessels were assigned to Latsis "because he was taking care of the electronics systems of the ships." in other words, the whole fleet. Latsis reported to Kaparis.

Following Latsis's surgery and recuperation, lasting approximately six weeks, during which he received full pay, he resumed his duties in July, 1989, in Miami, and on September 30 sailed with the Galileo to Bremerhaven, Germany, where the vessel was placed in drydock. The conversion of the vessel was a $65 million job during the course of which the vessel's bottom plates and propeller were removed, the conversion being completed in March, 1990, and the vessel being renamed the Meridian. Latsis, who had been with the vessel the entire time it was in drydock in Bremerhaven, sailed back to the United States aboard the Meridian and continued to work for Chandris until November, 1990, at which time his employment

with Chandris terminated. Suit was filed in October, 1991. The district court had subject matter jurisdiction under 28 U.S.C § 1331 (1988), and 46 U.S.C. app. § 688 (1988).

B. Proceedings Below

Trial lasted four days. In the charge to the jury, the judge told the jury that the plaintiff must prove, by a preponderance of the evidence, four elements, namely, that he was a member of the crew of a vessel acting in the course of his employment, that is, that he was a seaman; second, that the defendants were his employer; third, that the defendants or an officer, employee, or agent of one of them was negligent; and, fourth, that such negligence played a part in bringing about the injury to the plaintiff. As to the first element, the jury was told that it could find that the plaintiff was a seaman if the jury found, by a preponderance of the evidence, two things:

> First, the plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may *not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation.* You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers. (emphasis added).

The second element was stipulated to, and that was that plaintiff's capacity and duties performed "contributed to the function of the vessel or the accomplishment

of the vessels' mission or to the operation or maintenance of the vessels during their movements or while at anchor for the vessels' future trips." The court instructed that the second element involved in proving seaman status had been met, and that in considering whether plaintiff has otherwise proved seaman status, "you should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer."

Latsis did not object to these instructions in their entirety. Latsis did object, however, to that portion of the charge that "explicitly takes from the jury's consideration the period of time that the Galileo was in drydock in Germany." The jury returned a verdict in favor of Chandris solely on the issue of Latsis's status as a "seaman" pursuant to the Jones Act. On June 17, 1993, the clerk entered a final judgment. On July 15, 1993, Latsis filed a timely notice of appeal. This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1988).

We now hold that the jury instructions were an erroneous application of the law. We therefore remand the case for retrial with jury instructions in accordance with this opinion.

II. Standard of Review

Normally, we will not consider a challenge to a jury charge if a party failed to object at trial. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection"). Thus, where "no timely objection was

made to the instruction or to the interrogatories in the district court . . . we may reverse on this ground only if 'the district court committed plain error in its charge and interrogatories.' " *Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1078 (2d Cir. 1993) (footnote omitted) (quoting *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 636 (2d Cir. 1986)). An error is plain "if it results in a miscarriage of justice, or if it is an obvious instance of misapplied law." *Abou-Khadra*, 4 F.3d at 1078; *Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 493-94 (2d Cir. 1985). Although even a plain error will not warrant reversal if it is harmless, we will reverse where a plainly erroneous instruction misapplies the law as to a core issue in the case resulting in the substantial prejudice of the party challenging the instruction on appeal. *Schaafsma*, 802 F.2d at 637; *see* Fed. R. Civ. P. 61. Although Latsis objected to the drydock portion of the instruction, he failed to object to the instruction as a whole. We therefore review Latsis's claim under the plain error standard.

III. Discussion

A. The Definition of "Seaman" in the Second Circuit before *Wilander*

Prior to the Supreme Court's recent opinions in *Wilander* and *Gizoni*, this circuit's definition of "seaman" under the Jones Act was three-pronged:

> "the vessel must be *in navigation*, there must be a *more or less permanent connection* with the ship, and the worker must be aboard naturally and primarily as an *aid to navigation*."

Salgado, 514 F.2d at 755 (quoting *Klarman v. Santini*, 503 F.2d 29, 33 (2d Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), and *Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966)) (emphasis added to distinguish the prongs). For convenience, we denominate these prongs (1) the "vessel in navigation," (2) the "substantial connection," and (3) the "aid to navigation" elements.[1] The Second Circuit test very closely followed the test first adopted by the First Circuit in *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941) (citations from sundry circuit courts omitted). Cases in several other circuits also had adopted essentially the same test. *See, e.g., McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953) (defining "member of a crew" in accordance with the three-pronged test); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383, 388 (6th Cir.) (laborers employed in dredging operations to level off gravel pumped up from river bottom and pumped onto barges held to be seamen under the Jones Act), *cert. denied*, 346 U.S. 817 (1953); *Rackus v. Moore-McCormick Lines, Inc.*, 85 F. Supp. 185, 187 (E.D. Pa. 1949); *see also* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 94 (1985) (the "Robertson article").

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[1] As a minor matter, we note that *Wilander* refers to this element as "aid *in* navigation." Other courts have used the phrase "aid *to* navigation." To emphasize the difference between this element and the "vessel *in* navigation" element, we use the phrase "aid *to* navigation."

B. The Demise of the "Aid to Navigation" Element – *Wilander*

Early on, the Fifth Circuit, in *Offshore Co. v. Robison*, 266 F.2d 769, 779-80 (5th Cir. 1959), criticized the "aid to navigation" language of the three-pronged test:

> Our review of the cases shows this [aid to navigation] test has been watered down until the words have lost their natural meaning. . . . With due deference to the Supreme Court, we attach less importance to either of these catchphrases than we do to the cases piled on cases in which recovery is allowed when by no stretch of the imagination can it be said that the claimant had anything to do with navigation and is a member of the ship's company only in the sense that his duties have a connection with the mission or the function of the floatable structure where he was injured.

Id. at 780 (jury question raised whether roughneck as member of drilling crew was a seaman working on main deck of a mobile drilling platform or barge resting on the bottom of the Gulf of Mexico). After review of the Supreme Court and other relevant case law, the *Robison* court reformulated the criteria for seaman status:

> there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in

> terms of its maintenance during its movement or during anchorage for its future trips.

Robison, 266 F.2d at 779 (footnote omitted).[2] Thus, the Fifth Circuit abandoned the "aid to navigation" element of the common law definition of seaman in favor of language that reflected the tendency of the courts to extend seaman status to employees who do what the Supreme Court would eventually call "the ship's work." *See Wilander*, 498 U.S. at 355.

The *Robison* test differs from the three-pronged test in two other significant respects, however. First, the *Robison* test dropped the first prong of the test, that is, the "vessel in navigation" element. Second, the *Robison* test replaced the more or less permanent connection prong of the test with the following requirement:

> the injured workman [must have been] assigned permanently to a vessel . . . or [must have] performed a substantial part of his work on the vessel.

Robison, 266 F.2d at 779 (footnote omitted).

Eventually, the *Robison* test became the accepted test of the Fifth Circuit. *See, e.g., Balfer v. Mayronne Mud & Chem. Co.*, 762 F.2d 432, 434 (5th Cir. 1985). This court, however, retained the three-pronged test. *See, e.g., Salgado*, 514 F.2d at 755; *Buccellato v. City of New York*, 808 F. Supp 967, 971 (E.D.N.Y. 1992). In *Johnson v. John F. Beasley Constr. Co.*, 742 F. 2d 1054, 1062-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), the Seventh Circuit

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[2] We note again that the jury instructions in this case are substantially based upon the *Robison* test.

attempted to highlight the difference between the two tests, focussing on the "aid to navigation" prong of the three-pronged test and the significant contribution aspect of the *Robison* test. Reasoning that the significant contribution aspect of the *Robison* test was "too broad," the Seventh Circuit adopted yet another test for seaman status – one combining the "more or less permanent connection" and the "vessel in navigation" elements of the three-pronged test and a requirement that "the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Id.* at 1063.

The Supreme Court in *Wilander* addressed the conflict between the Fifth Circuit's *Robison* test and the Seventh Circuit's *Johnson* test, *Wilander*, 498 U.S. at 340, but only as to one difference between the two tests – the aid to navigation requirement. The Supreme Court jettisoned the "aid to navigation" element, and announced that "the better rule is to define 'master or member of a crew' under the [Longshore and Harbor Workers Compensation Act], and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation." *Wilander*, 498 U.S. at 353, 354. The Court observed, that "[t]his rule best explains our case law and is consistent with the pre-Jones Act interpretation of 'seaman' and Congress' land-based/sea-based distinction." *Id.* at 354. The Court continued to write, "It is not the employee's particular job that is determinative, but the employee's connection to a vessel," *id.*, and concluded that "[t]he key to seaman status is employment-related connection to a vessel in navigation." *Id.* at 355.

In so doing, the Court adopted only so much of the *Robison* test as required that a seaman's duties " 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' " *Wilander*, 498 U.S. at 355 (quoting *Robison*, 266 F.2d at 779). The Court did not adopt the *Robison* test in its entirety. Indeed, the Court cited, with apparent approval, the Robertson article which called for revision of the *Robison* test, stating that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* As we discuss more fully below, the Court did not follow *Robison*'s departure from the "vessel in navigation" element of *Salgado*. On the contrary, the Court's language, "[t]he key to seaman status is employment-related connection to a *vessel in navigation*," *id.* (emphasis added), confirms that this element remains an important part of the definition of a seaman. Also, the Court expressly noted that, "[w]e are not called upon here to define this connection in all details." *Id.* Further, the Court in *Wilander* did not state that an employment-related connection to a vessel was a complete definition of seaman. *See id.* at 355 (stating that "we hold that a *necessary* element of the connection is that a seaman perform the work of a vessel") (emphasis added). The Court offered no indication as to whether the substantiality of the connection must still be established or, if so, whether it would be determined pursuant to the "more or less permanent connection" element of the "*Johnson* test" (as well as the three-pronged *Salgado* test) or pursuant to the language of the two-part *Robison* test.

C. The "Substantial Connection" Element after *Wilander*

As discussed above, the Supreme Court in *Wilander* did not determine under what circumstances an employment related connection with a vessel in navigation would be sufficiently substantial to qualify a plaintiff for seaman status. It is clear, however, that the Court did not express a preference for the criteria contained in the *Robison* test. Left unclear, therefore, is just what sort of connection will amount to a substantial connection. Indeed, the Supreme Court did not even recognize, much less resolve the conflict between the criteria used to determine substantial connection under the *Robison* test and those used under the *Johnson* and *Salgado* tests. Again as noted above, the Court limited its holding to the "aid to navigation" element of the three-prong test, concluding that "[t]he key to seaman status is employment-related connection to a vessel in navigation," but declined "to define this connection in all details." 498 U.S. at 355.

Nor does the Supreme Court's opinion in *Gizoni* offer much guidance in the way of what constitutes a substantial connection. In *Gizoni*, decided after *Wilander*, the Court held that a maritime worker whose occupation is one of those enumerated in the LHWCA may be nevertheless a seaman within the meaning of the Jones Act, at least where the harbor worker is also a "member of a crew of any vessel," as explained in *Wilander*. *Gizoni*, 112 S.Ct. at 491. The *Gizoni* Court quoted *Wilander* in saying that " '[t]he key to seaman status is employment-related

connection to a vessel in navigation. . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.' " *Id.* at 492 (quoting *Wilander*, 498 U.S. at 355). No mention is made in either *Wilander* or *Gizoni* of the "permanent connection" language in the *Robison* case.

In this case, there is no question that Latsis at the time of his injury, was connected to a vessel in navigation, that his connection was employment-related, and that at least at the time of his injury he was "doing the ship's work," namely, action as a supervising engineer on board the vessel. In fact, it is precisely this part of the jury charge to which Chandris stipulated. Whether this connection was substantial, however, was in dispute. In charging the jury on this question, the district court appears to have adopted language from the two-part *Robison* test, instructing the jury that to find Latsis a seaman they must find that:

> First, the plaintiff was either permanently assigned to a vessel or performed a substantial part of his work on the vessel.

See Robison, 266 F.2d at 779 ("the injured workman [must have been] assigned permanently to a vessel . . . or [must have] performed a substantial part of his work on the vessel.") (footnote omitted). Absent disapproval by the Supreme Court, the "more or less permanent connection" formulation of the substantial connection requirement remains the law of this circuit. Therefore, it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit in *Robison*.

The formulation of substantial connection followed by this circuit in *Salgado* is quite different from that followed by the Fifth Circuit in *Robison*. The more or less permanent connection element of the *Salgado* test is not merely a temporal concept. Under *Salgado* the substantial connection element is satisfied where there is a "more or less permanent connection with the ship." *See, e.g, Salgado*, 514 F.2d at 755 (internal quotation marks omitted). Later cases expanded the "substantial connection" element to include connections not just to one particular ship, but to an identifiable group of vessels.[3] *See Magnolia Towing Co. v. Pace*, 378 F.2d 12, 13 (5th Cir. 1967) (per curiam) (pilot connected with several of defendant's tugboats held a seaman); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir. 1960) (holding that a master mechanic and an assistant who performed all maintenance, repair and overhaul work on several of defendant's ferries, often while ferries were operating, could be seamen); *see also Guidry v. Continental Oil Co.*, 640 F.2d 523, 528 n.14 (5th Cir.) ("relationship between the individual and an identifiable vessel or *group of vessels* must be substantial in point and time, not spasmodic")

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[3] The Robertson article refers to this rule as "the 'Fleet Amendment' to the *Robison* Test," 64 Tex. L. Rev. at 96. It goes on to suggest that the fleet cases present an "obvious doctrinal problem" because "[i]nvolvement with a single vessel, as opposed to multiple vessels, was one of the most obvious distinctions between the traditional seaman and the traditional longshoreman." *Id.* at 98. We cite these cases in support of the proposition that a person can be a "seaman" although he was not assigned to a particular vessel, but rather connected with several vessels or with a fleet. We do *not* adhere to the permanency requirement of these cases.

(emphasis added), *cert. denied*, 454 U.S. 818 (1981); *Rotolo v. Halliburton Co.*, 317 F.2d 9, 12-13 (5th Cir.) (injured person must have been assigned to or performed a substantial part of his work on "a particular vessel or several specified vessels.") (citing *Braniff*), *cert. denied*, 375 U.S. 852 (1963).[4]

As pointed out by Judge Glasser in *Buccellato*, the substantial connection requirement has not been interpreted by the courts of this circuit in a narrow temporal sense. *Buccellato*, 808 F. Supp. at 972. As Judge Glasser observed, *Salgado*, quoting two earlier decisions, *Klarman* and *Harney*, only required that plaintiff have a "*more or less* permanent connection with the ship." *Salgado*, 514 F.2d at 755 (emphasis added). The court in *Klarman* had noted that the permanent connection requirement has not been read strictly but meant that the connection must be more than "temporary or transitory." *Klarman*, 503 F.2d at 33 (quoting *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 394 (9th Cir. 1973) ("Significantly, the connection

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[4] We underscore that both the test that we last explicated in *Salgado* and the Supreme Court's *Wilander* test speak of "connection" rather than "assignment" to a vessel. We note also that the charge in question, like the *Robison* test, referred to "assignment" rather than "connection," and in this sense might have been particularly confusing to the jury because Latsis was not "assigned" to the S.S. Galileo except temporarily from time to time. Rather, he was responsible for a fleet of vessels as to which it has long been held a person may be a seaman. *See, e.g., Guidry*, 640 F.2d at 529. It is true that the instruction here did go on to say that "vessel" could be a single ship or a number of ships owned and operated by the employer, so to that extent it took the "Fleet Amendment" into account. But this caveat did not make the charge any the less confusing.

may be less than permanent, but it cannot be temporary or transitory")). In *Harney*, the court noted, but did not decide, that the permanent connection requirement may include "shore-based employees who, though regularly coming aboard, spend less than a full shift there." *Harney*, 359 F.2d at 654.

An earlier Second Circuit case, not mentioned by Judge Glasser, is even more supportive of his conclusions in *Buccellato* that "the case law in this Circuit does not unequivocally require a Jones Act seaman to be substantially connected to a vessel or group of vessels as opposed to being connected to a vessel or group of vessels on a steady basis." *Buccellato*, 808 F. Supp. at 972. That is the case of *Weiss v. Cent. R.R. Co. of New Jersey*, 235 F.2d 309 (2d Cir. 1956). There, a plaintiff who in the course of his 19-day employment worked seven days on ferry boats as a deckhand or wheelsman and on six other days was employed on shore as a doorman or bridgeman, jobs connected with the docking and departure of ferries, was held a Jones Act seaman. The court noted that weighing against his claim were the factors that he was employed aboard ship for only a short period of time, that during that period he slept and ate most of his meals ashore, that he was paid an hourly wage and worked for the most part an eight-hour day, that he was employed for part of the time on jobs ashore, that he was working on an extra-man rather than on a regular basis, and that he had no seaman's papers. 235 F.2d at 311. Further, the *Weiss* Court cited *Bailey v. City of New York*, 55 F. Supp. 699 (S.D.N.Y. 1944), *affirmed*, 153 F.2d 427 (2d Cir. 1946), which held that a ferry boat engineer who worked a regular eight-hour day and slept at home was a seaman,

as was a similar land-based dredge employee in *Pariser v. City of New York*, 146 F.2d 431 (2d Cir. 1945). *See Weiss*, 235 F.2d at 3132.[5]

Unlike the *Salgado* formulation of the substantial connection requirement, the language of the *Robison* test frames the substantial connection issue primarily, if not solely, in temporal terms. Specifically, the *Robison* test provides that:

> there is an evidentiary basis for a Jones Act case to go to the jury . . . if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel.

Robison, 266 F.2d at 779 (footnote omitted). Early cases applying this test recognized that "the word 'permanent' has never been assigned a literal interpretation under the Jones Act and should not be given a 'wooden application,' but rather, is to be used as an analytical starting point instead of a self-executing formula." *Guidry*, 640 F.2d at 529 (citations omitted). Through subsequent applications of this test, however, the Fifth Circuit clearly expressed its view that substantial connection is a temporal concept to be determined by the duration of the putative seaman's connection to the vessel. *Barrett v.*

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[5] Judge Nygaard, in dissent, has made a similar observation in the Third Circuit. *Evans v. United Arab Shipping Co.*, 4 F.3d 207 at 220-21 (3d Cir. 1993) (Nygaard, dissenting) ("under Third Circuit law the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the worker's duties as they relate to the ship and the ship's mission at the time of the injury").

Chevron, U.S.A., Inc., 781 F.2d 1067, 1074-75 (5th Cir. 1986) (en banc); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 & n.6 (5th Cir. 1980).[6]

By adopting the *Robison* test for a substantial connection, the district court limited the jury's consideration to Latsis's temporal relation to the vessel. This substantially prejudiced Latsis. Had the jury not been instructed to determine whether Latsis's contribution to the vessel was substantial only in temporal terms of "permanent assignment" or having performed a substantial part of his work aboard the vessel, the jury could well have found Latsis to be a seaman. A jury could find that he did have a substantial connection with the vessels though he may not have been on board ship a great percentage of his time because he did the specific work of supervising the

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[6] In a dissenting opinion, Judge Rubin, joined by five other judges, took issue with the majority's narrow interpretation of the substantial connection requirement as purely temporal concept. Judge Rubin wrote:

> [a plaintiff's] status as a crew member, vel non, should be determined by considering the transitory duration or fixed term of the assignment, the nature of his duties during it, and the relationship of those duties to the mission of the vessel. Thus, a fact finder might find that an anchor handler who is assigned to work on a specific vessel for a period of days is a crew member during that assignment. A worker may also be assigned to work as a crew member for a series of voyages of limited duration. . . . An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment.

Barrett, 781 F.2d at 1077 (Rubin, J., dissenting).

electronics systems of the ships, upgrading their computerized systems, and dealing with the computerized communication between the ships and office. Thus a jury could have found a substantial connection even though Latsis's work did not involve "permanent assignment" to a vessel or to a fleet of vessels and even if we take, as the jury might have taken, Kaparis's testimony that Latsis was on board ships only 10 percent of the time at face value. We therefore hold that the district court's instruction erroneously applied the law of this circuit regarding a core element of Latsis's claim – to the substantial prejudice of Latsis.

D. The "Drydock Instruction"

We turn now to the district court's "drydock instruction." As noted above, the district court instructed the jury:

> In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation.

In so instructing, the district court seems to have injected the third prong of the old *Salgado* test – "vessel in navigation," into the substantial connection requirement. We find that this instruction further emphasized the putative seaman's temporal connection to the vessel at the risk of confusing the jury and frustrating the underlying policy of the Jones Act.

Even before the enactment of the Jones Act in 1920, Learned Hand, in extending seaman status to a bartender

on board a vessel, remarked that there is "in principle no reason why there should be an artificial limitation of rights to those engaged in the navigation of the ship, to the exclusion of others who equally further the purposes of her voyage." *The J.S. Warden*, 175 F. 314, 315 (S.D.N.Y. 1910). Judge Hand's words capture the spirit of the Jones Act, to compensate those injured in the course of work exposing them to the perils of the sea. This spirit is captured in the "vessel in navigation" element. Moreover, this element of the three-pronged test for seaman has survived *Wilander*. *See Wilander*, 498 U.S. 355 ("the key to seaman status is employment-related connection to a vessel *in navigation*") (emphasis added).

Courts have interpreted "perils of the sea" broadly. Not only may seamen recover under the Jones Act for injuries traditionally associated with the sea – a swinging boom, a sinking ship – but seamen may recover for injuries more commonly experienced by land-based employees. *See, e.g., Pace*, 378 F.2d at 12 (recovery allowed for seaman injured in automobile accident while en route to vessel). In this case, Latsis's employment did expose him to the perils of the sea – in fact, his injury was result of such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician. If that physician is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling. Not every worker connected with a vessel is exposed to the perils of the sea, however. On the contrary, only workers connected to a "vessel *in navigation*" are so exposed – even if the exposure results in nothing more than an injury sustained

while driving to the vessel. *See id.* The "vessel in navigation" element, therefore, does not limit the substantiality of an employee's connection with a vessel. Rather, the "vessel in navigation" element was designed to limit seaman status to those whose employment regularly exposes them to the hazards of the sea.

We note that the case upon which the district court evidently relied, in instructing the jury that in considering the substantial connection element it should discount the time during which the Meridian, formerly the S.S. Galileo, was in drydock in Germany, involved an accident while the vessel was in drydock and, hence, not in navigation. *See McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 569-70 (9th Cir. 1992). *McKinley* may properly be read as holding that a ship undergoing complete conversion, as the vessel was in that case, takes a vessel out of navigation. *See West v. United States*, 361 U.S. 118, 121 (1959) (per curiam) (non-Jones Act case finding no warranty of seaworthiness while vessel was undergoing major structural repairs). But this does not necessarily mean that the time during which a vessel is undergoing conversion cannot count towards the substantiality of an employment-related connection with the vessel. During the course of Latsis's employment with Chandris – omitting the consulting time – from approximately March of 1989 until his termination in November, 1990, he spent some six months working seven days a week on board the vessel, supervising the project as the only naval architect, including the drydocking, bottom removal, cleaning and removal of the propellers, overhauling the main engines, rebuilding the boilers, and reconstructing the accommodation spaces and public rooms. Why this time

should not count in terms of determining the substantiality of his connection to the Chandris vessels, we do not know. While we express no opinion as to whether Latsis would have been covered had he been injured while the vessel was in drydock in Bremerhaven, we do suggest that in terms of meeting any requirement of connection to the vessel or vessels, this time can count.

IV. CONCLUSION

Although *Salgado*'s formulation of the substantial connection element remains the law of this circuit after *Wilander* and *Gizoni*, we think it useful to clarify this formulation in light of *Wilander* and *Gizoni*. Such clarification is made all the more pressing by the fact that although *Wilander* and *Gizoni* left *Salgado*'s formulation of the substantial connection requirement intact, the Supreme Court in those cases did jettison another aspect – the aid to navigation element – of that test.

Clarification is also important considering that the Fifth Circuit has continued to adhere to its narrow interpretation of the substantial connection requirement. In *Bach v. Trident Steamship Company, Inc.*, 920 F. 2d 322 (5th Cir.), *vacated*, ___ U.S. ___, 111 S. Ct. 2253 (1991), two members of the panel held that a compulsory pilot was not a seaman because he was not connected to a vessel or an identifiable fleet of vessels, and refused to find an exception in favor of a maritime worker who spends virtually all of his time performing traditional seaman's duties – work closely related to the movement of vessels – but does his work on short voyages aboard a large number of vessels. Judge Brown dissented, stating that

Congress did not mean to exclude from the protection of the Jones Act compulsory pilots while aboard in directing the navigation of a vessel. *See Bach*, 920 F.2d at 327-33 (Brown, J., dissenting). The Supreme Court vacated the opinion and remanded for reconsideration in light of *Wilander*. ___ U.S. at ___, 111 S. Ct. at 2253. The panel majority reinstated its decision, holding that it had previously "concluded that [the pilot] was not a seaman because he was not permanently assigned to any particular vessel or fleet of vessels." *Bach v. Trident S.S. Co., Inc.*, 947 F.2d 1290, 1291 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1996 (1992). Judge Brown again dissented, stating that "although *Wilander* turns out not to be the decisive guide," what it does say affords "undeniable support" to the views he had set forth in his initial dissent. *Bach*, 947 F.2d at 1291 (Brown, J., dissenting). In addition, he quoted the *Wilander* case extensively and we may read him as saying that at least in the case of a pilot and his unique status as a seagoing functionary, the requirement of "permanency" set forth in the various cases as a part of the test is simply no longer of force and effect, at least in the temporal sense.

The substantial connection requirement has two purposes. First, by requiring a "more or less permanent connection *with a vessel*" or with a fleet of vessels, it excludes from Jones Act seaman status workers whose work may bring them into contact with many vessels but who are not connected with any particular vessel or identifiable group of vessels. Through this exclusion, the substantial connection element leaves workers with no connection to a particular vessel or group of vessels to coverage under the Longshore and Harbor Workers'

Compensation Act (LHWCA) – from which "seaman" or, more precisely, "a master or member of a crew of any vessel" are themselves excluded. 33 U.S.C. § 901 *et seq.* (1988). Second, by requiring a "*more or less permanent connection* with a vessel" or fleet of vessels, it excludes from coverage those whose contribution, although limited to a single vessel or fleet of vessels, was nevertheless only a temporary or transitory connection with the vessel. *See Klarman*, 503 F.2d at 33 (putative seaman's connection must be more than "temporary or transitory").

It seems that much of the confusion surrounding "more or less permanent connection with a vessel" language is attributable to the fact that the language is designed to perform two functions – i.e., exclude two different types of workers from seaman status. *See Buccellato*, 808 F. Supp. at 972. Indeed, the Fifth Circuit's adherence to a narrowly interpreted permanent assignment requirement has been criticized by the Supreme Court of Louisiana on essentially this ground. *Folse v. W. Atlas Int'l, Inc./Downhole Seismic Servs.*, 593 So. 2d 341 (La. 1992). In *Folse*, the plaintiff had been held by the Louisiana Court of Appeal not to be a seaman because he was not permanently attached to a specific vessel or an identifiable fleet of vessels. *See Folse v. W. Atlas Int'l, Inc.*, 580 So. 2d 482 (La.App. 4th Cir. 1991), *rev'd*, 593 So.2d 341 (La. 1992). In reversing, the Supreme Court of Louisiana discussed the permanent attachment language of *Robison* and *Bach*, saying that "[t]his requirement was designed to distinguish between transitory, land-based employees and those working aboard a vessel for a voyage." 593 So. 2d at 343 (citing the Robertson article). The majority pointed out that *Wilander* did not mention more or less

permanent attachment to a vessel or fleet of vessels,[7] and that *Gizoni* cast further doubt on this requirement because Gizoni "only 'rode' the platforms during working hours." *Id.* The Louisiana court went on to say that Folse was not a land-based worker providing shore services to docked vessels but rather a seaman who went to sea on specific short voyages and who was not merely a transitory employee. The court went on to say that although Folse's assignment was less transient than Bach's, it was not permanent. Rather, "[i]t involved substantial work on given missions." *Id.*[8]

We find that much confusion could be alleviated by breaking down the "more or less permanent connection with a vessel" language into two separate elements. Thus, the substantial connection requirement is met where the putative seaman establishes an employment-related contribution that is (1) limited to a single vessel or group of vessels and (2) substantial in terms of its (a) duration and (b) nature. In considering whether the putative seaman's contribution is substantial in terms of its duration, the jury may consider the number and frequency of similar contributions to that vessel or to an identifiable fleet of vessels. Further, in considering whether the contribution

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[7] Justice Dennis, concurring in the *Folse* majority, suggested "that the *Robison* requirement of permanent attachment is subsumed in the greater definition of *Wilander* that to qualify as a seaman, an employee must contribute to the function of a vessel." 593 So. 2d at 344 (Dennis, J., concurring).

[8] The same is true of Latsis, except that on shore Latsis was directly involved with the electronic communications and equipment of the Chandris fleet, surely of considerable importance to their navigation.

is substantial in terms of its nature, the jury may consider the amount of time and effort spent ashore preparing for the contribution, as well as the amount and time and effort spent in drydock consummating the contribution.

We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

In this case, the first of the foregoing criteria was stipulated to. As to the second, there is no dispute in the evidence and the verdict should accordingly be directed. The third – the substantiality element – is not only in dispute, but the evidence is not clear as to what extent Latsis's land-based and drydock work bore on (3)(b). Therefore, we instruct the trial court to frame its instructions to the jury in light of *Wilander* and *Gizoni* and other cases and opinions above referred to, not in terms of assignment to a vessel or as requiring permanency but, rather, in terms of the employment-related connection to the Chandris fleet. The jury also should be instructed that in determining what is "substantial" in terms of the duration of Latsis's contribution to the vessel or fleet of vessels, the number and frequency of similar contributions may be taken into account. Further, the jury should also be instructed that in determining what is "substantial" in

terms of the nature of Latsis's contribution, Latsis's onshore preparation should be taken into account, as well as the time Latsis spent in drydock in Bremerhaven, Germany consummating his contribution. Finally, the jury should also be instructed to determine whether the course of Latsis's employment regularly exposed him to the hazards of the sea. As to the proof of these matters, the putative seaman of course has the burden.

Judgment vacated, case remanded for retrial with instructions to the jury in accordance with this opinion.

Latsis v. Chandris, Inc.
No. 93-7704

MAR 24 1994

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED: MAR 24 1994
GEORGE LANGE III, CLERK

KEARSE, *Circuit Judge*, dissenting:

I respectfully dissent.

Though I agree that the four criteria articulated by the majority *ante* at 31-32 should govern the determination of whether an employee is a "seaman" within the meaning of the Jones Act, even under that formulation I am unpersuaded that the non-dry-dock part of the district court's instructions, to which Latsis made no objection, constituted "plain" error. Further, I am unpersuaded

that the district judge erred in instructing the jury that, in determining whether plaintiff Latsis was a seaman, it should disregard the period during which the *Galileo* was in dry dock. The Jones Act concept of " 'seaman' " contains a "land-based/sea-based distinction." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 354 (1991). The $65 million-dollar dry-dock conversion and reconstruction of the *Galileo* was unquestionably a land-based activity. In my view, this part of the instructions – the only part to which Latsis objected – was correct.

Accordingly, since in my view the only portion of the instructions to which Latsis objected was not erroneous, and since the remainder of the instructions did not constitute plain error, I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED: MAY 24 1994
GEORGE LANGE, III, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of May on thousand nine hundred and ninety four

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Antonios Latsis,
Plaintiff-Appellant,
-v-
Chandris, Inc., Chandris, S.A.,
Trans Oceanic Shipping Co., Ltd.,
Defendants-Appellees.

DOCKET
NUMBER 93-7704

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellees Chandris, Inc., Chandris, S.A. and Trans Oceanic Shipping Co., Ltd.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ _____
Carolyn Clark Campbell
Chief Deputy Clerk

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

No. 94-325

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

WHETHER TO QUALIFY AS A SEAMAN UNDER THE JONES ACT, 46 U.S.C. § 688, A MARITIME WORKER MUST, AT A MINIMUM, PERFORM A SUBSTANTIAL PART OF HIS WORK ON A VESSEL IN NAVIGATION.

LIST OF PARTIES

The parties are Petitioners Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., and Respondent Antonios Latsis.

Petitioners Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd. are affiliated with the following corporations: Celebrity Cruises, Inc., Celebrity Cruise Services Ltd., Celebrity Cruises (Management), Inc., Celebrity Cruise Lines, Inc. and Chandris (England) Limited.

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No. 94-325

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The Order denying the Petition for Rehearing in the United States Court of Appeals for the Second Circuit (J.A. 248-249) is unreported. The opinion of the Second Circuit (J.A. 215-247) is reported at 20 F.3d 45. The opinion of the United States District Court for the Southern District of New York (J.A. 212-214) is unreported.

JURISDICTION

The opinion of the Second Circuit was entered on March 24, 1994. (J.A. 215-247). Petitioners timely filed a Petition for Rehearing, which was denied by a Court of Appeals order entered on May 24, 1994. (J.A. 248-249). The Petition for Writ of Certiorari was filed on August 22, 1994, and was granted on October 17, 1994. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article III, Section 2, Clause 1, of the United States Constitution, provides, in relevant part, that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

JONES ACT STATUTORY PROVISION

The Jones Act, 46 U.S.C. § 688, provides, in relevant part, "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law. . . . "

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT STATUTORY PROVISION

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), provides, in relevant part, " 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-

worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel. . . . "

STATEMENT OF THE CASE

Factual Background

Respondent Antonios Latsis ("Mr. Latsis") started his employment with Petitioners Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd. (collectively "Chandris") in September 1988. (J.A. 49). For the first three months, Mr. Latsis was employed by Chandris as an engineering consultant. (J.A. 48-49). In January 1989, Chandris employed Mr. Latsis as a salaried superintendent engineer. (J.A. 54-56, 173). As a superintendent engineer, Mr. Latsis was responsible for updating and upgrading the electronic and communication equipment on the Chandris vessels. (J.A. 173).

Mr. Latsis' assignment was to update and upgrade shipboard equipment for six passenger ships in the Chandris fleet, including the S/S GALILEO. (J.A. 51-53, 173-175). Each passenger ship in the Chandris fleet carried between 12 and 14 sea-based licensed engineers who were permanently assigned to a specific vessel. (J.A. 174-175). Mr. Latsis was not assigned to any particular Chandris vessel. (J.A. 176).

Mr. Latsis was one of two superintendent engineers based at Chandris' Miami, Florida office. (J.A. 112-113, 173-174). Chandris' Miami office is the principal United States office of the Chandris engineering department. (J.A. 54). Although Chandris assisted Mr. Latsis with payments for an apartment and automobile in Miami, Mr.

Latsis and his family maintained a residence in Rye, New York. (J.A. 54-55, 173-174).

Primarily, Mr. Latsis planned and directed work aboard the Chandris fleet from shore. (J.A. 106-107, 173-174, 177). When necessary to perform his job as a superintendent engineer, Mr. Latsis boarded the various Chandris vessels while they were in port and between trips. (J.A. 107-108, 176). On some occasions, Mr. Latsis would remain on board a particular vessel during all or a portion of its voyage to investigate or assist with specific engineering problems. (J.A. 107-108, 178).

The evidence in the District Court regarding the percentage of work time that Mr. Latsis spent on board Chandris vessels is in conflict. Mr. Latsis opined that he spent seventy-two percent of his time aboard Chandris vessels. (J.A. 57-58). Mr. Latsis' supervisor, Senior Vice President Demetrios Kaparis ("Mr. Kaparis"), testified that Mr. Latsis was on Chandris vessels only ten percent of Mr. Latsis' work time. (J.A. 179-180). No definitive documentary evidence was presented in the District Court regarding Mr. Latsis' time on vessels.

Although Mr. Latsis did hold a deck officer's license issued in Greece, Mr. Latsis did not sail on that license after 1967. (J.A. 168). Mr. Latsis' employment between 1967 and September 1988 consisted of land-based work as a marine surveyor, marine engineer, naval architect and superintendent engineer for a steamship company. (J.A. 36-43).

On May 14, 1989, Mr. Latsis was on board the S/S GALILEO along with Mr. Kaparis and several other superintendent engineers. (J.A. 91). Mr. Latsis and the

other superintendent engineers, who were all employed in the shore-side engineering department of Chandris, were on board the vessel for the purpose of assisting and providing information to shipyard representatives who had been requested to submit bids for a major rebuilding of the S/S GALILEO. (J.A. 61-63, 180).

Prior to sailing on the S/S GALILEO on May 14, 1989, Mr. Latsis experienced vision problems in his right eye. (J.A. 63-64, 159). Mr. Latsis' vision problems continued and Mr. Latsis consulted with the ship's physician, Dr. Gonzalez, shortly after the vessel sailed from Baltimore, Maryland en route to Bermuda. (J.A. 64-65). After examining Mr. Latsis, Dr. Gonzalez recommended that Mr. Latsis consult with an ophthalmologist when the S/S GALILEO arrived in Bermuda on May 16, 1989. (J.A. 67-68).

Prior to disembarkation for medical treatment in Bermuda, Mr. Latsis was given a Chandris form requesting and authorizing shoreside medical treatment for his eye. (J.A. 78-80, 196-198, 208). The form was dated May 14, 1989, and was signed by the ship's captain, chief purser and Dr. Gonzalez. (J.A. 78-80, 208). On the form, the name "Latsis Antonios" was typed after the printed words "name of crew member" and "Supt. Engineer" was typed after the printed words "position." "Rule out Detected [sic] Retina please" was typed after "Ship's Doctor's Remarks." The printed form also contained other references to "crew member." (J.A. 77-80, 208).

In Bermuda, the ophthalmologist determined that Mr. Latsis had suffered a detached retina. (J.A. 74). The

ophthalmologist performed surgery on Mr. Latsis' eye on May 17, 1989. (J.A. 80, 82-83, 123, 182-185).

After recuperating at his home in New York for approximately three months, Mr. Latsis returned to his employment as a land-based superintendent engineer in Chandris' Miami office. (J.A. 88-89, 123).

The rebuilding of the S/S GALILEO eventually occurred between October 1989 and March 1990 at Bremerhaven, Germany. (J.A. 89, 91, 134-135). Mr. Latsis sailed to and from Bremerhaven aboard the S/S GALILEO and attended on board while the work on the S/S GALILEO was performed in drydock in Bremerhaven. (J.A. 89, 133-135, 199-200).

Mr. Latsis' employment with Chandris terminated in November 1990. (J.A. 56-57, 95, 186-187).

Procedural History

In October 1991, Mr. Latsis commenced a lawsuit against Chandris based solely on the Jones Act, 46 U.S.C. § 688. (J.A. 4-7). Mr. Latsis' suit alleged that his eye injury occurred while employed as a seaman by Chandris, Inc. In March 1992, Mr. Latsis filed an amended complaint naming additional defendants "Chandris, S.A. and Trans Oceanic Shipping Co., Ltd.," as alleged owners of the vessel. (J.A. 8-12). Chandris answered the amended complaint and denied Mr. Latsis' allegation that he was a seaman within the meaning of the Jones Act. (J.A. 17-21).

In June 1993, a jury trial was held in the District Court. At the conclusion of the trial, the District Court instructed the jury on the law. (J.A. 209-211). The jury

instruction utilized by the District Court regarding seaman status ("District Court Instruction") was based on *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) and *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 348 (1991). The District Court Instruction stated that Mr. Latsis was a seaman if:

> [T]he plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation. You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers.
>
> * * *
>
> "[Y]ou should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer."

(J.A. 210-211). Mr. Latsis objected only to the portion of the District Court Instruction regarding the irrelevancy of the S/S GALILEO's time in drydock. *Latsis v. Chandris, Inc.*, 20 F.3d 45, 49 (2d Cir. 1994).

After deliberating, the jury rendered a verdict finding that Mr. Latsis was not a seaman. In accordance with the jury verdict, the District Court entered a judgment dismissing the lawsuit on June 17, 1993. (J.A. 212-214).

In July 1993, Mr. Latsis appealed to the Second Circuit. (J.A. 224). On March 24, 1994, the Second Circuit

vacated the District Court's judgment based on the Second Circuit's conclusion that the District Court Instruction constituted plain error. *Latsis*, 20 F.3d at 54-55, 58. The Second Circuit vacated the District Court's dismissal and ordered a new jury trial even though the record contained competent evidence that Mr. Latsis spent only ten percent of his time aboard ship. *Latsis*, 20 F.3d at 48, 54.

In remanding this case to the District Court for a new trial, the Second Circuit ordered the District Court to instruct the jury as follows:

> The [seaman status] test will be [satisfied if you find] that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) *the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature*; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

Latsis, 20 F.3d at 57 (emphasis added) (hereinafter "Latsis Seaman Test"). Chandris' timely petition for rehearing to the Second Circuit was denied on May 24, 1994. (J.A. 248). This Court granted Chandris' petition for writ of certiorari on October 17, 1994.

SUMMARY OF ARGUMENT

Mr. Latsis failed to object to the District Court's jury instruction on seaman status in its entirety. Therefore, Mr. Latsis was required to establish plain error in order to

avoid the jury's verdict that Mr. Latsis was not a seaman. Because the District Court Instruction conformed with *Wilander*, other Supreme Court precedent, and *Robison*, the District Court Instruction did not constitute any error. Moreover, even if the District Court Instruction was in error, the District Court Instruction did not constitute plain error and the Second Circuit's reversal of the jury verdict and district court judgment is unwarranted.

Two of the undeniable principles articulated in *Wilander* are that (a) seaman status is normally a jury question and (b) seamen do not include land-based maritime workers. Notwithstanding the Court's clear statements of the law, *Latsis* overruled the jury's verdict and ordered the District Court to utilize the Latsis Seaman Test at retrial. The Latsis Seaman Test unequivocally conflicts with *Wilander* because the Latsis Seaman Test would allow a land-based maritime worker to obtain status as a seaman even if the land-based maritime worker spent only ten percent of his work time on vessels. *Latsis'* rebuke of the role of the jury and the land-based/sea-based distinction in *Wilander* is without support. This Court should reject *Latsis*.

The District Court Instruction was based on *Robison* and *Wilander*. The Second Circuit criticized the Robison Seaman Test as a rogue seaman test that places undue emphasis on the temporal aspect of the employment-related connection between a maritime worker and his vessel. However, when the Robison Seaman Test is analyzed in the context of *Wilander* and other Supreme Court precedent, the only potentially valid criticism is that the Robison Seaman Test is less strict than *Wilander* and other Supreme Court decisions regarding who is a

seaman. Mr. Latsis was not prejudiced by the District Court Instruction because the District Court Instruction either applied the law fairly or was unduly favorable to Mr. Latsis. The jury verdict should be reinstated.

In the context of the instant case, the Robison Seaman Test provided a proper beacon for the District Court. However, when seaman status is analyzed in the context of Congress' policy to provide sea-based workers with more protection than land-based workers based on the sea-based worker's exposure to perils *at sea* (or dangers attendant to the movement of vessels on navigable waters), the Robison Seaman Test is too weak. Regardless, when the proper Post-Wilander Seaman Test is articulated, the Post-Wilander Seaman Test is more restrictive than the Robison Seaman Test with respect to who is a seaman. Again, Mr. Latsis benefitted from, and was not harmed by, the District Court Instruction. No basis exists for overturning the jury's verdict.

ARGUMENT

Because of the extensive remedies afforded to seamen under the Jones Act and because the Jones Act does not define the statutory term "seaman," the question of who is a seaman has challenged the state and federal courts since the Jones Act became law in 1920. As one author states, "[i]f one searches through the [seaman status] decisions with enough diligence, language supporting almost any client's argument for or against seaman status can generally be found." David W. Robertson, *A New*

Approach to Determining Seaman Status, 64 Tex. L. Rev. 79, 108 (1985) ("Robertson Article").

Notwithstanding the complexity and confusion regarding the question of who is a seaman under the Jones Act, three unassailable principles emerge from this Court. First, a maritime worker is not required to aid in the navigation of a vessel to qualify as a seaman. *Wilander*, 498 U.S. at 337, 353, 355. Rather, a seaman must contribute to the function of the vessel or the accomplishment of its mission. *Wilander*, 498 U.S. at 355.

Second, if reasonable persons applying the proper legal standard can differ as to whether a maritime worker is a seaman, the maritime worker's ability to qualify as a seaman is a fact question for the jury. *Wilander*, 498 U.S. at 356; *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 371, 374 (1957); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940).

Third, "Congress established a clear distinction between land-based and sea-based maritime workers." *Wilander*, 498 U.S. at 347. Only sea-based maritime workers, who have an employment-related connection to a vessel in navigation, are seamen. *Wilander*, 498 U.S. at 347-348. Land-based workers are not seamen. *Wilander*, 498 U.S. at 347-348.

Contrary to the Court's second principle, the Second Circuit reversed the jury's determination that Mr. Latsis was not a seaman. In justifying its decision to overrule the jury, the Second Circuit criticized the District Court Instruction. The Second Circuit criticized the District Court Instruction even though the jury verdict was consistent with this Court's third principle, which recognizes

the critical distinction between land-based and sea-based maritime workers. Further, the Second Circuit directed the District Court to utilize a jury instruction that would allow the jury to find that a land-based maritime worker is a seaman, even a land-based worker who spent only ten percent of his work time on vessels.

Latsis violates two of the unassailable principles of this Court. The seaman status test articulated in *Latsis* should be rejected and the jury's decision should be reinstated.

I

MR. LATSIS FAILED TO OBJECT TO THE DISTRICT COURT INSTRUCTION

Rule 51, Federal Rules of Civil Procedure, states as follows:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

As the Second Circuit acknowledged, Mr. Latsis failed to object to the District Court Instruction as a whole. *Latsis*, 20 F.3d at 49. Therefore, the Second Circuit reviewed Mr. Latsis' claim under the plain error standard. *Latsis*, 20 F.3d at 50.

An error is plain "if it results in a miscarriage of justice, or if it is an obvious instance of misapplied law." *Latsis*, 20 F.3d at 49 (citing with approval *Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1078 (2d Cir. 1993)). The District Court Instruction was based on the seaman test stated in

Robison and *Wilander* and was not error. Even if the District Court Instruction is a "slight departure" from the three-part seaman test articulated in *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975) ("Three-part or Salgado Seaman Test"), the District Court Instruction did not constitute plain error sufficient to negate Rule 51, Federal Rules of Civil Procedure.[1] *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992) (no basis for reversal where court's instruction is merely a slight departure from the statutory standard); *Wilander*, 498 U.S. 337.

In *Latsis*, the Second Circuit concluded that it was "plain error" when the District Court failed to use the Three-part or Salgado Seaman Test to instruct the jury. The Second Circuit's criticism of the District Court Instruction is ironic because the Second Circuit itself failed to adopt any portion of the Three-part or Salgado Seaman Test in creating its seaman test in *Latsis*. 20 F.3d at 57.

The District Court's use of a test based on *Robison* and *Wilander* did not "deprive[] the jury of adequate legal guidance to reach a rational decision" or constitute plain error. *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1026 (2d Cir. 1991); *Wilander*, 498 U.S. 337. As discussed below, the District Court

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[1] The Three-part or Salgado Seaman Test instructs as follows:

> [T]he vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation.

514 F.2d at 755.

Instruction either conforms to *Wilander* and represents an accurate statement of the law or the District Court Instruction is more favorable to Mr. Latsis than the seaman test required under *Wilander*. No basis exists for the Second Circuit's finding of plain error and the jury verdict for Chandris should be reinstated.

II

THE LATSIS SEAMAN TEST CONFLICTS WITH *WILANDER* AND OTHER SUPREME COURT PRECEDENT

In *Latsis*, the Second Circuit recognized the need to revise the Three-part or Salgado Seaman Test in the wake of *Wilander* and *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991). Instead of conforming the new Second Circuit seaman status test to the principles articulated in *Wilander* and *Gizoni*, *Latsis* created the Latsis Seaman Test that conflicts with the decisions of this Court.

Although *Latsis* holds that a substantial employment-related connection to a vessel is necessary to qualify as a seaman, the third element of the Latsis Seaman Test is satisfied if either the duration of the maritime worker's vessel-based employment *or the nature of the maritime worker's contribution to the vessel's mission or function is substantial*. 20 F.3d at 57-58. Pursuant to *Latsis*, the actual time spent aboard a vessel is not determinative. 20 F.3d at 54. Surprisingly, a maritime worker can satisfy the Latsis Seaman Test merely by proving that he expended a substantial amount of shore-based time and effort preparing

to contribute to the function of the vessel or to the accomplishment of its mission, regardless of the amount of time spent on the vessel and regardless of whether the worker is a land-based or sea-based employee. *Latsis*, 20 F.3d at 57.

The conflict between *Latsis* and *Wilander* is not subtle. In overruling the jury verdict, the Second Circuit held as follows:

> Had the jury not been instructed to determine whether Latsis's contribution to the vessel was substantial only in temporal terms of a "permanent assignment" or having performed a substantial part of his work aboard the vessel, the jury could well have found Latsis to be a seaman. A jury could find that he did have a substantial connection with the vessels though he may not have been on board ship a great percentage of his time because he did the specific work of supervising the electronics systems of the ships, upgrading their computerized systems, and dealing with the computerized communication between the ships and office. Thus, *a jury could have found a substantial connection even though Latsis's work did not involve "permanent assignment" to a vessel or to a fleet of vessels and even if we take, as the jury might have taken, Kaparis's testimony that Latsis was on board ships only 10 percent of the time at face value.*

Latsis, 20 F.3d at 54 (emphasis added). Also, *Latsis* instructs that, in determining whether a maritime worker has a substantial employment-related connection to a vessel, "the jury may consider *the amount of time and effort [the maritime worker] spen[ds] ashore* preparing for the contribution, as well as the amount of time and effort spent

in drydock consummating the contribution." 20 F.3d at 57 (emphasis added). In admonishing the District Court regarding how to instruct the jury at the retrial, the Second Circuit explained:

> [T]he jury should also be instructed that in determining what is "substantial" in terms of the nature of Latsis's contribution, Latsis's *on-shore preparation should be taken into account*, as well as the time Latsis spent in drydock in Bremerhaven, Germany consummating his contribution.

Latsis, 20 F.3d at 58 (emphasis added).

Latsis' incorporation of shore-based workers into the class of seamen protected by the Jones Act collides with *Wilander* and ignores the land-based/sea-based distinction mandated by Congress. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"); *Wilander*, 498 U.S. at 347-348, 353-354. Specifically, *Wilander* holds:

> Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.
>
> * * *
>
> [U]nder the Jones Act or general maritime law, seamen do not include land-based workers.
>
> * * *
>
> The "member of a crew" exception in the LHWCA overrules [*International Stevedoring Co. v.] Haverty* [, 272 U.S. 50 (1926)]; "master or member of a crew" restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee.
>
> * * *
>
> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that "seaman" had been taken to include land-based employees.
>
> * * *
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction.

498 U.S. at 347-348, 353-354. Notwithstanding *Wilander's* unequivocal statements that only sea-based workers are seamen, even land-based workers who spend ninety percent of their time and effort on shore preparing to contribute to the function of a vessel are eligible for seamen status under *Latsis*. 20 F.3d at 54. *Latsis* ignores the sea-based/land-based distinction that is critical to *Wilander*. 498 U.S. at 347-348, 353-354.

This Court should reject the substantial connection test contained in *Latsis* and confirm a test that is consistent with *Wilander* and *Gizoni*. As discussed below, any reasonable interpretation of *Wilander* supports a seaman test that is the same as, or less favorable to Mr. Latsis

than, the District Court Instruction. This Court should reverse the Second Circuit and reinstate the jury's verdict.

III

THE DISTRICT COURT INSTRUCTION IS LESS RESTRICTIVE THAN THE SEAMAN TEST ARTICULATED PREVIOUSLY BY THIS COURT

As recognized by the Second Circuit, the District Court Instruction is based primarily on the seaman test that was originally set forth in *Robison* ("Robison Seaman Test"). The Robison Seaman Test states as follows:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was *assigned permanently to a vessel* (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or *performed a substantial part of his work on the vessel;* and (2) if the capacity in which he was employed or the duties which he performed *contributed to the function of the vessel or to the accomplishment of its mission*. . . .

Robison, 226 F.2d at 779 (emphasis added). The Second Circuit concluded that the District Court's decision to instruct the jury based on the Robison Seaman Test constituted plain error. *Latsis*, 20 F.3d at 46. In support of its conclusion, the Second Circuit criticized this Court for "not even recogniz[ing], much less resolv[ing] the conflict between the criteria used to determine substantial connection under the *Robison* [Seaman T]est and those used under the . . . [Three-part or] *Salgado* [Seaman T]est[]."

Latsis, 20 F.3d at 52. Contrary to the Second Circuit's criticism, *Wilander* is not silent regarding what employment-related connection to a vessel is necessary for a maritime worker to become a seaman. 498 U.S. at 347-348, 353-354.

Wilander and other Supreme Court precedent provide significant guidance to all lower courts regarding the employment-related connection to a vessel in navigation necessary for a maritime worker to qualify as a seaman under the Jones Act. *Wilander* states:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. *See Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (CA5 1938) ("There is implied a *definite and permanent connection with the vessel*, an obligation to forward her enterprise"), cited approvingly in *Norton*, 321 U.S., at 573.

498 U.S. at 355 (emphasis added). Apparently, *Latsis* overlooked the "permanent connection" language in *Wilander*.

In *Norton v. Warner Co.*, 321 U.S. 565 (1944), this Court upheld the reversal of a deputy commissioner's decision that a maritime worker was not a seaman. The Court concluded that the deputy commissioner's decision was erroneous because the maritime worker "had that *permanent attachment to the vessel* which commonly characterizes a crew." *Norton*, 321 U.S. at 573 (emphasis added).

Senko reinstated the jury's finding that plaintiff Senko was a seaman because "[there was] sufficient evidence in

the record for the jury to decide that [*Senko*] was *permanently attached to and employed by the dredge* as a member of its crew." 352 U.S. at 372 (emphasis added).

Likewise, in analyzing the difference between the remedies available to fixed and floating platform maritime workers, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), explains as follows:

> Offshore oil rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels by the lower courts. Workers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. *If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA* because they are employed on navigable waters.

470 U.S. at 417 n.2 (emphasis added) (citations omitted).

Finally, in *Gizoni*, the Court affirmed plaintiff Gizoni's right to a jury trial on seaman status where the maritime worker alleged that "as a rigging foreman [the maritime worker] was *permanently assigned* to [a] group of vessels." 502 U.S. at ___, 112 S.Ct. at 490. *Gizoni* affirmed the Ninth Circuit's determination that a summary judgment finding that Gizoni was not a seaman was unwarranted because a fact question existed regarding "whether Gizoni's *relationship to [the vessels] was permanent*." 502 U.S. at ___, 112 S.Ct. at 490.

Existing Supreme Court precedent confirms that the "permanent assignment/substantial performance" prong of the Robison Seaman Test is not too restrictive. Moreover, the Supreme Court's statements to date support the proposition that the Robison Seaman Test is too weak and

that a permanent connection to a vessel is required to establish seaman status. *Wilander*, 498 U.S. at 355; *Gizoni*, 502 U.S. at ___, 112 S.Ct. at 490; *Herb's Welding*, 470 U.S. at 417 n.2; *Norton*, 321 U.S. at 573; *Senko*, 352 U.S. at 372. *But see Butler v. Whiteman*, 356 U.S. 271 (1958); *Grimes v. Raymond Concrete Piling Co.*, 356 U.S. 252 (1958).

Regardless of whether this Court ultimately defines the employment-related connection to a vessel necessary to qualify as a seaman as absolutely permanent or something less, the Second Circuit's criticism of the Robison Seaman Test and the District Court Instruction is meritless.

IV

THE DISTRICT COURT INSTRUCTION IS LESS RESTRICTIVE THAN THE PROPER POST-WILANDER SEAMAN TEST

In describing the need to establish a clear distinction between land-based and sea-based maritime workers, *Wilander* confirms that a critical basis for distinguishing between land-based and sea-based maritime workers is that sea-based workers are regularly exposed to special perils and dangers of work *at sea*. *Wilander*, 498 U.S. at 354. Land-based workers, even those working on navigable waters, are not exposed to perils *at sea* or dangers attendant to moving vessels. *See Bouvier v. Krenz*, 702 F.2d 89, 90-91 (5th Cir. 1983).

In *Wilander*, this Court cited the Robertson Article, 64 Tex. L. Rev. 79, with approval on the limited issue of the importance of the distinction between perils faced by land-based, as opposed to sea-based, maritime workers.

498 U.S. at 354. The Robertson Article describes the relevancy of the perils of the sea to seaman status as follows:

> Exposure to the "perils of the sea" and to risks attending the movement of vessels on navigable water are the distinguishing characteristics of a seaman's work.
>
> * * *
>
> [A]ny list [of perils of the sea] would certainly include the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor.
>
> The sea is obviously a high risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land, piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water. A worker whose duties frequently take him aboard moving vessels, or who is otherwise significantly exposed to risks generated by moving vessels, confronts seamen's dangers. Like the perils of the sea, the risks attending the movement of vessels on navigable water are also distinguishing characteristics of the seaman's work environment.

64 Tex. L. Rev. at 80-81 (footnotes omitted). Thus, the Robertson Article provides compelling arguments supporting this Court's land-based/sea-based distinction

based on the distinct dangers facing those two groups of maritime workers.

Likewise, *Wilander* recognizes the importance of the dangers inherent in working *at sea* in determining who is a seaman. *Wilander* clarifies the remedies available to maritime workers as follows:

> [T]he Jones Act and the LHWCA are mutually exclusive. The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel": "We must take it that the effect of these provisions of the [LHWCA] is to *confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters* and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA]."
>
> * * *
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work *at sea* in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.

498 U.S. at 347, 354 (emphasis added) (citation omitted) (alterations in original). Sea-based maritime workers receive the added protection and remedies afforded to seamen because they are exposed to (a) the perils of the

sea defined as the full range of dangers associated with working away from port and *at sea* or (b) the dangers attendant to the movement of vessels on navigable waterways. *Wilander*, 498 U.S. 337; *Wallace v. Oceaneering Intern.*, 727 F.2d 427, 433-436 (5th Cir. 1984); Robertson Article, 64 Tex. L. Rev. 79. *See also Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943).

Conversely, land-based/shore-based workers should receive only the remedies and protection dictated by the LHWCA. *Wilander*, 498 U.S. at 353-354. Shore-based workers should be restricted to the remedies of the LHWCA even though their work is difficult and not risk free and even though they will undoubtedly work aboard vessels moored or docked on navigable waterways and become subject to wind, weather, tides and currents. Robertson Article, 64 Tex. L. Rev. at 80-81, 97. The key difference is that shore-based workers are not subject to those conditions while *at sea* and away from the facilities, comfort and alternatives available while working ashore or aboard a moored or docked vessel. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 104-105 (1946); *Bouvier*, 702 F.2d at 90-91; Robertson Article, 64 Tex. L. Rev. at 80-81, 97.

In addressing the ability of the Robison Seaman Test to maintain the distinction between sea-based and land-based workers, the Robertson Article states as follows:

> [The first prong of the Robison Seaman Test] . . . served as a ready basis for delimiting seamen from traditional longshoremen and similar *amphibious workers who may spend most of each work day aboard vessels*, but who lack the requisite connection with any particular vessel. As a matter of policy, *it makes sense to exclude such workers from seaman status; their work on stationary vessels, firmly moored or anchored in calm inland waters, does not typically expose them to the perils of the sea or to the characteristic seamen's dangers associated with the movement of vessels on navigable water.*

* * *

> One of the most important functions of the [Robison Seaman Test] approach has been to supply a doctrinal basis for denying seaman status as a matter of law to *longshoremen, ship repairmen, and other shore-based service workers who often spend most or all of their work time aboard vessels. Robison* excludes these workers from seaman status on the basis of their lack of attachment to an identifiable vessel or fleet. The policy of the seamen's protections is well served, inasmuch as *these workers typically do not confront sea perils or dangers associated with the movement of vessels on navigable water.*

64 Tex. L. Rev. at 97, 102-103 (emphasis added). However, as the Robertson Article recognizes, "*Robison* started losing resolving power when the 'fleet [doctrine]' required the courts to forsake the requirement of a work connection to a single vessel." 64 Tex. L. Rev. at 108.

The genesis of the fleet doctrine is *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). The plaintiffs in *Bertrand* could not prove a permanent assignment to, or substantial work aboard, a specific vessel. 700 F.2d at 243. In reversing the District Court's summary judgment against

seaman status, the Fifth Circuit concluded that the plaintiffs satisfied the Robison Seaman Test because the plaintiffs performed a substantial part of their work aboard an identifiable fleet of vessels. *Bertrand*, 700 F.2d at 248. Since *Bertrand*, an employment-related connection to one specific vessel is not necessary to qualify as a seaman. 700 F.2d at 244-245; *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1257-1258 (3d Cir. 1994).

In certain circumstances involving shore-based amphibious workers, the fleet doctrine improperly weakens the ability of the Robison Seaman Test to distinguish between sea-based and land-based workers. For example, under the Robison Seaman Test as supplemented by the fleet doctrine, a shore-based maritime worker ("Shore-based Worker") who is employed by a shoreside vessel repair or maintenance company ("Repair Facility Employer") *superficially* satisfies the Robison Seaman Test if the Shore-based Worker spends a substantial portion of his time working aboard a fleet of vessels owned by a single legal entity (the "Fleet") on a navigable waterway ("Navigable Waterway").

Moreover, the Shore-based Worker could superficially satisfy the Robison Seaman Test even though all of his work aboard the Fleet occurred while the vessels were secured to the Repair Facility Employer's pier and in sheltered waters. Also, the Shore-based Worker could superficially satisfy the Robison Seaman Test even though the Shore-based Worker is performing the exact same work that his next-door neighbor is performing at a ship repair or maintenance facility ("Neighbor") on the same Navigable Waterway as long as the Neighbor's employer

performs repair and maintenance work for several different owners.

The achilles heel of the Robison Seaman Test after the fleet doctrine is that the Shore-based Worker is arguably "perform[ing] a substantial part of his work on [a fleet of] vessel[s] and contribut[ing] to the function of the vessel[s] or to the accomplishment of [their] mission." *Robison*, 226 F.2d at 779. Conversely, the Neighbor performing the same work on the same Navigable Waterway is unequivocally a longshoreman because the Neighbor does not perform a substantial part of the Neighbor's work for an identifiable fleet. *Campo v. Electro-Coal Transfer Corp.*, 970 F.2d 51 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1261 (1993).[2]

Nevertheless, the fleet doctrine is not inherently flawed. The deficiency lies in the Robison Seaman Test's inability to completely distinguish between land-based and sea-based maritime workers based on their relevant exposure to perils *at sea* or attendant to the movement of vessels on navigable waters. This deficiency in the legal definition of a seaman must be remedied because "[i]t is for the court to define the statutory standard. 'Member of a crew' and 'seaman' are statutory terms; their interpretation is a question of law." *Wilander*, 498 U.S. at 356. As the Robertson Article notes:

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[2] Similarly, before the fleet doctrine, Mr. Latsis' status as a longshoreman under the LHWCA would be manifest. Mr. Latsis had no permanent or substantial work-related connection with any specific Chandris vessel. Therefore, absent the fleet doctrine, Mr. Latsis would have no basis to assert seaman status.

> The courts can either attempt to resuscitate *Robison* in some fashion, or they can acknowledge the degree of the injured worker's exposure to seamen's dangers – perils of the sea or dangers associated with the movement of vessels on navigable water – as a controlling part of the applicable doctrine.

64 Tex. L. Rev. at 111-112 (footnote omitted).[3]

Based on this Court's acknowledgment of the importance of the relationship between working *at sea* and the special protection afforded to seamen, this Court's positive reference to the dissent in *Sieracki*, 328 U.S. 85, and Congress' clear intent to differentiate between shore-based and land-based maritime workers with the passage of the LHWCA, Chandris submits that the following seaman test best implements the law required by Congress and interpreted by *Wilander* ("Post-Wilander Seaman Test"):

> A maritime worker is a seaman if the worker: (1) has a permanent employment connection to a vessel in navigation or performs a substantial part of his work on a vessel while exposed to marine perils *at sea* or to the dangers attendant to the movement of vessels on navigable waters; and (2) contributes to the function of the vessel or the accomplishment of its mission.

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[3] Another option is to eliminate the Substantiality Prong of the Robison Seaman Test and require maritime workers to have a permanent connection to a vessel or fleet of vessels to qualify as a seaman. *Wilander*, 498 U.S. at 355; *Gizoni*, 502 U.S. ___, 112 S.Ct. at 490; *Herb's Welding*, 470 U.S. at 417 n.2; *Senko*, 352 U.S. at 372; *Norton*, 321 U.S. at 573. *But see Butler*, 356 U.S. 281; *Grimes*, 356 U.S. 252.

The Post-Wilander Seaman Test reflects the Court's recognition of Congress' mandate to distinguish between land-based and sea-based maritime workers.[4] Also, the Post-Wilander Seaman Test is based on the relevant policy considerations that maritime workers who are exposed to the additional marine perils associated with being away from port and *at sea* or the dangers attendant to the

---

[4] The Court's emphasis on the perils faced by maritime workers *at sea*, as opposed to "perils of the sea," is critical. *Wilander*, 498 U.S. at 354. This emphasis must be maintained so that juries deciding seaman status cases can apply the proper legal standard in distinguishing between sea-based and land-based maritime workers. *Wilander*, 498 U.S. at 347-348, 353-356. Juries must not be allowed to consider the time that a maritime worker is aboard a vessel moored or docked at a pier as satisfying the substantial performance prong of the Post-Wilander Seaman Test based on the argument that the maritime worker faces "perils of the sea" such as wind, weather, tides, currents, parting lines, drowning, exposed decks, slippery surfaces, and poor communication with shore. If juries are allowed to consider a maritime worker's time aboard a docked or moored vessel in determining seaman status, the law governing land-based maritime workers will regress to *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926) and *Sieracki*, 328 U.S. 85 (both improperly conferring seaman status on land-based maritime workers). *Wilander*, 498 U.S. at 346-348. Congress' intent to distinguish between sea-based and land-based workers in passing the LHWCA is clear. *Wilander*, 498 U.S. at 347-348, 353-354. Absent clear instructions requiring juries to consider only perils from maritime work *at sea* (or attendant to the movement of vessels), the distinction between (a) sea-based maritime workers or "seaman" and (b) land-based maritime workers or "longshoreman" will be lost. Juries make findings of fact. *Wilander*, 498 U.S. at 355-356. However, unless juries are given clear, specific legal instructions defining who is a seaman, Congress' intent will not be fulfilled.

movement of vessels should receive the special remedies available only to seamen.

Conversely, land-based maritime workers, even those who spend a substantial amount of time maintaining, repairing or unloading vessels on navigable waterways, should receive the remedies provided by the LHWCA.

Most significantly, the Post-Wilander Seaman Test is less favorable to Mr. Latsis than the District Court Instruction. Therefore, because the Latsis Seaman Test conflicts with *Wilander* and other Supreme Court precedent and because the District Court Instruction is based on the Robison Seaman Test (which is less restrictive than the Post-Wilander Seaman Test), the District Court Instruction does not constitute plain error. This Court should reverse the Second Circuit and reinstate the jury's verdict.

CONCLUSION

The judgment of the Second Circuit should be reversed and the District Court jury verdict and judgment should be reinstated.

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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

-against-

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C.App. § 688(a)?

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STATUTES AND CONSTITUTIONAL PROVISIONS

1. Article III, Section 2 of the United States Constitution provides in pertinent part that "[t]he judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction." Congress gets its power to enact admiralty and maritime legislation from the foregoing provision together with Article I, Section 8, Clause 18 of the Constitution,[1] which provides in pertinent part:

> The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

2. The Jones Act, 46 U.S.C.App. § 688(a), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

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[1] See Panama R.R. Co. v. Johnson, 264 U.S. 375, 386-87 (1924) (holding that Congress enacted the Jones Act pursuant to its powers derived from Article III, Section 2 and Article I, Section 8, Clause 18); Crowell v. Benson, 285 U.S. 22, 39 & n. 2 (1932) (indicating that Congress enacted the Longshore and Harbor Workers' Compensation Act pursuant to those same powers).

3. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G), excludes from its coverage "a master or member of a crew of any vessel."

4. The Longshore Act term "master or member of a crew of any vessel" defines the term "seaman" in the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 491 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946).

STATEMENT OF THE CASE

Plaintiff-respondent Antonios Latsis is fifty-four years old. For all of his working life he has been a licensed seaman, working on and in connection with ocean-going vessels. He received a serious eye injury – the injury in suit – while assigned in May, 1989 as a superintendent engineer to his employer's vessel the S.S. Galileo for the duration of a scheduled five-day voyage from Baltimore to Bermuda and back.[2] The injury occurred because of the negligence of the ship's doctor during that voyage. The doctor – "unlicensed in any state in the United States"[3] – suspected that Latsis had a detached retina but "neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that ' . . . any patient with a suspected or established retinal detachment should be seen on an

[2] J.A. 62. Because Mr. Latsis was hurt and had to be hospitalized in Bermuda, he completed only the outbound leg and could not return with the vessel to Baltimore.

[3] Opinion below, 20 F.3d 45, 47, J.A. 218.

emergency basis by an ophthalmologist.' "[4] Injury to a seaman by an incompetent ship's physician is a classic peril of the sea.[5]

Instead of following standard medical procedure, the ship's doctor merely told Mr. Latsis to take it easy during the voyage and to see an ophthalmologist when the ship reached Bermuda.[6] The doctor prepared a "Request for Medical Treatment" form – signed by himself as well as by the ship's master and chief purser – indicating that the Bermuda ophthalmologist should "rule out detected [sic] retina please". This form designated Mr. Latsis as a "crew member" of the Galileo with the position of "supt. engineer."[7]

Latsis's background is entirely that of a seafaring man. He went to sea immediately on graduation from high school in 1959 in his native Greece, joining the Merchant Marine as a cadet.[8] Four years later he was certified as a second mate; he served in that capacity for the next sixteen months on vessels sailing throughout the world.[9] He then was appointed captain of a small Mediterranean vessel, remaining in that job for about five months.[10] Latsis then took an assignment as chief mate on

[4] 20 F.3d at 47, J.A. 218-19.

[5] See text and note 29, infra.

[6] J.A. 66-68.

[7] J.A. 78-80, 208.

[8] J.A. 32.

[9] J.A. 32-34.

[10] J.A. 35.

a larger vessel; that job lasted six months. At the conclusion of that assignment he took and passed the examination for a chief mate's license.[11]

In August 1967, Latsis married an American citizen. Later that year the couple moved to the United States, where Latsis was naturalized in December, 1967.[12] He worked in San Francisco as a ship surveyor[13] and ship's clerk[14] while continuing his education at the University of California at Berkeley, studying to become a naval architect.[15]

In 1973 Berkeley awarded Latsis a Bachelor of Science degree in mechanical engineering; in 1974, Latsis got his Master's Degree as a naval architect.[16] Latsis and his wife then moved to New York, where he was employed by the American Bureau of Shipping as a research engineer. Latsis stayed in that job for something over three years.[17] In December 1977 he left the American Bureau of Shipping job and went to work for Southern Star Shipping Company as a superintendent engineer.[18] For the next eleven years Latsis supervised Southern Star's vessels' operations and maintenance, frequently sailing with the vessels in order to perform his job.[19]

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[11] J.A. 36.

[12] J.A. 36.

[13] J.A. 37.

[14] J.A. 39.

[15] J.A. 39.

[16] J.A. 40.

[17] J.A. 42.

[18] J.A. 43.

[19] J.A. 43-45.

In September 1988 Latsis took a position with defendant-petitioner Chandris, Inc. ("Chandris"). He started as a consultant in a sort of probationary status and became a permanent employee after three months. The job title was superintendent engineer. Chandris ran a large fleet of merchant vessels, five of which operated from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico.[20] Latsis's duties were not confined to any single vessel but extended over the whole fleet. "Latsis's duties included not only overseeing the vessel's engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore."[21] He was "required . . . to travel with various ships in the fleet from time to time. The evidence at trial was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent."[22]

The S.S. Galileo was the Chandris, Inc. vessel with which Latsis was most heavily involved. The Galileo was twenty-seven years old and needed major overhauling, modifications, and refurbishment.[23] The company planned to send her to Germany to have that work done,

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[20] J.A. 48. Petitioner's Brief on the Merits (at p. 3) is somewhat misleading in indicating that there were six ships. The five were Amerikanis (J.A. 51), Azure (J.A. 119), Britanis (J.A. 109), Galileo (J.A. 51), and Victoria (J.A. 115). A sixth ship, the Horizon, did not go into service until May 1990 (J.A. 95).

[21] 20 F.3d at 48, J.A. 220. See also J.A. 48-58.

[22] 20 F.3d at 48, J.A. 220. See Latsis's testimony, J.A. 57-58; Kaparis's testimony, J.A. 179-80.

[23] J.A. 51-52.

but a great deal of preliminary inspection, study, and planning had to be accomplished first. Latsis often sailed with the Galileo in his capacity as superintendent engineer in order to help plan the overhaul. In late 1988 or early 1989 Latsis sailed with the Galileo from Miami to Mexico and return, a five-day trip.[24] In early May, 1989, he sailed with the Galileo on a two-day cruise out from Baltimore and back.[25]

Then we come to the voyage in suit. On May 14, 1989, Latsis sailed with the Galileo from Baltimore, bound for Bermuda. Quite busy until the very moment the ship left the dock, Latsis tried to ignore the central vision disturbance that began to trouble him that morning aboard the vessel. When the vessel sailed, he saw the ship's doctor, who diagnosed a suspected detached retina but failed to follow standard medical practice for treating that condition.[26] The result has been that Latsis has lost 75% of the vision in his right eye;[27] the eye is also disfigured and relatively immobile.[28] As the court below noted, this injury resulted from a classic peril of the sea: A seaman at sea with a medical emergency is helplessly reliant on the ship's doctor. If that doctor "is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling."[29]

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[24] J.A. 51, 53.

[25] J.A. 62.

[26] J.A. 64-67, 208.

[27] J.A. 83.

[28] J.A. 92-93.

[29] 20 F.3d at 55, J.A. 239.

The details of the voyage, injury, and medical treatment are significant. Latsis was aboard the vessel in the port of Baltimore, preparing for the voyage, when he began having the problem with the vision in his right eye. He first noticed this at about noon on Sunday, May 14.[30] He was too busy to see the ship's doctor until the vessel sailed at about 4:30 p.m.[31] The doctor diagnosed a suspected detached retina but did not follow elementary medical procedure, which would have been to direct Mr. Latsis to see an ophthalmologist immediately, "on an emergency basis".[32] This could easily have been done: the vessel took eleven hours to get from Baltimore to the open sea, and at any time during that period Mr. Latsis could have been taken off the vessel by pilot boat and transported to shore for medical attention.[33]

The vessel reached the open sea at about 3:30 a.m. on Monday, May 15.[34] Mr. Latsis suffered with the eye during the voyage to Bermuda. The vessel docked in Bermuda at about 11:00 a.m. on Tuesday, May 16.[35] Mr. Latsis saw an eye doctor in Hamilton, Bermuda, at about 1:15 that day, and was in the hospital being prepared for surgery by 5:00 that afternoon.[36] The surgery was done the morning of Wednesday, May 17.[37] Mr. Latsis remained

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[30] J.A. 64.

[31] J.A. 64-65.

[32] 20 F.3d at 47, J.A. 218-19.

[33] J.A. 68-69.

[34] J.A. 69.

[35] J.A. 71-72.

[36] J.A. 73-74, 76-77.

[37] J.A. 77.

in the hospital until May 22[38] and then returned home to convalesce.

After a six-week period[39] of recuperation, Latsis resumed his duties. On September 30 he sailed with the Galileo from Philadelphia to Bremerhaven, Germany, where the overhaul was to occur. This voyage took fourteen days.[40] Latsis worked on the Galileo at the drydocks in Bremerhaven for six months, "[e]very day, seven days a week, from morning to about 11 o'clock in the evening."[41] When the Galileo emerged – remodeled and with a new name, the S.S. Meridian – Latsis sailed with her from Bremerhaven to Florida, another fourteen-day crossing.[42] Thereafter he continued to work for Chandris, Inc. During the period after the Galileo/Meridian conversion was completed, Latsis continued to work as a superintendent engineer, frequently sailing on the company's vessels between Atlantic ports in the United States and ports in the Caribbean.[43] His employment with Chandris was terminated in November, 1990.

Latsis brought this Jones Act suit in October, 1991. The trial judge gave a seaman status instruction following Fifth Circuit rather than Second Circuit law.[44] Although

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[38] J.A. 83-85.

[39] Petitioner's Brief on the Merits (at p. 6) is mistaken in stating that the recuperation period was three months. See J.A. 88, 123.

[40] J.A. 89, 133-34.

[41] J.A. 92.

[42] J.A. 94-95, 135.

[43] J.A. 107, 115, 119, 127, 144, 147, 155-57.

[44] See J.A. 210-11, 232.

advising the jury of the parties' stipulation that Latsis's . . . "work aboard these ships was a contribution to the functioning of the vessel and assisted in the accomplishment of its various missions"[45] the trial judge went on to rule that the Galileo was "out of navigation" as a matter of law during her six months in drydock in Bremerhaven[46] and charged the jury to ignore Latsis's services to the vessel during that period. The jury returned a verdict that Latsis was not a seaman. The Second Circuit reversed, holding that the trial judge had committed plain error in using Fifth Circuit seaman status law rather than Second Circuit seaman status law. The Second Circuit also held that the trial judge erred in telling the jury not to consider Latsis's services to the Galileo during her six months in dry dock in Germany as bearing on whether he had a substantial work connection with the ship.

SUMMARY OF ARGUMENT

For purposes of the injuries in suit, Mr. Latsis was a Jones Act seaman as a matter of law. This Court's recent unanimous decision in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), strongly supports the view that injuries incurred during a sea voyage by a worker assigned to the vessel for the duration of that voyage and working in furtherance of the vessel's mission are

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[45] 45 J.A. 211.

[46] J.A. 210: "In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation."

squarely within the protection of the Jones Act. Others of this Court's seaman status decisions are in accord, as are the decisions of the courts of appeals. This Court should therefore affirm the decision of the Second Circuit in this case – remanding the case for trial on the merits of Mr. Latsis's Jones Act claim – but should modify that decision to provide that the jury should be instructed that Latsis was a Jones Act seaman. This resolution is particularly appropriate where – as is true here – the worker was hurt by a classic peril of the sea and the defendant employer has acknowledged that the injured worker was a member of the crew of the vessel on which he was hurt.

In the alternative, this Court should affirm the decision below and order the case remanded for trial under proper jury instructions on the seaman status issue. Such a determination would be appropriate on either of two independently sufficient bases. First, the trial judge's ruling that the S.S. Galileo was out of navigation as a matter of law during her six months in drydock in Germany – and that consequently the jury must ignore Latsis's services to the vessel during that period – was strenuously objected to by the plaintiff. That ruling violated this Court's decisions in *Wilander*, *Butler v. Whiteman*, 356 U.S. 271 (1958) (*per curiam*), and *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370 (1957). *Wilander* makes clear that a worker's services in getting a vessel ready for its mission should count toward seaman status. *Butler* and *Senko* show that it was wrong to hold that the S.S. Galileo was out of navigation as a matter of law. *Senko* upheld seaman status for a handyman on a dredge that had never moved the entire time the man worked on it. *Butler* held that it was error to rule that an out-of-commission tugboat – immobile at dockside for more than ten months, without

Coast Guard certificate, crew, earnings, or movement of any kind – was out of navigation as a matter of law. The S.S. Galileo was far more meaningfully "in navigation" during her drydock period than were the vessels involved in *Senko* and *Butler*.

The final basis for affirming the Second Circuit's decision in this case gets to the most potentially far-reaching issue in this case: the clash between the Second Circuit's and Fifth Circuit's approaches to determining seaman status. The court below reversed the trial judge for having followed Fifth Circuit rather than Second Circuit law in this respect. This case affords the Court an excellent opportunity to clarify the general law of seaman status by approving the Second Circuit's test for seaman status as set forth by the court below:

> [T]he test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.[47]

The Fifth Circuit's current test for seaman status is in sharp contrast. It omits any reference to exposure to hazards of the sea and relies instead on a concatenation of confusing rules all of which rest uneasily upon the illusory comforts of quantification: Today the courts of

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[47] 20 F.3d at 57, J.A. 245.

the Fifth Circuit are required to try to count the injured worker's hours or days of contact with a vessel or vessels, to count the number of vessels with which the worker has been involved, and frequently to count the number of "vessel" and "nonvessel" attributes of the apparatus on which the worker was hurt. The result of these quite unsuccessful efforts to quantify seaman status law has been widespread confusion and frustration among the trial judges and practitioners in the Fifth Circuit who handle these cases on virtually a daily basis. Even the present defendant and its supporting amici curiae agree that the Fifth Circuit's law of seaman status is in disarray. The Second Circuit's test is far less prolix and confusing than the Fifth's. The Second Circuit's test is also faithful to the policy of the Jones Act as articulated in this Court's recent decisions in *Wilander* and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991), whereas the Fifth's demonstrably is not. The Second Circuit's test should be approved.

ARGUMENT

I. UNDER ANY OF THE EXTANT TESTS FOR SEAMAN STATUS, A WORKER ASSIGNED TO A VESSEL FOR THE DURATION OF A SEA VOYAGE AND WHOSE DUTIES CONTRIBUTE TO THE VESSEL'S MISSION IS A JONES ACT SEAMAN RESPECTING INJURIES INCURRED ON THAT VOYAGE.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), this Court quoted with approval a standard admiralty treatise:

> The term mariner includes all persons employed on board ships and vessels *during the voyage* to assist in their navigation and preservation, or to promote the purposes of the voyage.[48]

This was not isolated language; the whole thrust of the *Wilander* opinion was that "sea-based maritime workers . . . who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."[49] This Court quoted approvingly from a 1916 decision of the Southern District of New York:

> [E]very one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship *when she is upon a voyage*.[50]

The *Wilander* opinion concludes by stating:

> The inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel, and the employee's *precise relation* to it. * * * "The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the *activity in which he was engaged at the time of injury*."[51]

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[48] 498 U.S. at 344 [quoting E. Benedict, American Admiralty § 278, p. 158 (1850)] (*Wilander* Court's italics omitted; emphasis added).

[49] 498 U.S. at 347.

[50] 498 U.S. at 352 [quoting Norton v. Warner Co., 321 U.S. 565, 572 (1944); *Norton* in turn was quoting The Buena Ventura, 243 F. 797, 799 (S.D.N.Y.1916)] (emphasis added).

[51] 498 U.S. at 356 [quoting Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190 (1952)] (emphasis added).

Wilander's language thus supports the view that any worker who is assigned to a vessel for the duration of a voyage and whose duties contribute to the vessel's mission must be classified as a seaman respecting injuries incurred on that voyage. So does the *Wilander* decision's central policy thrust. At the core of *Wilander* is the Court's recognition that the purpose of the Jones Act is to protect workers against the "special hazards"[52] and "particular perils"[53] characteristic of work on vessels at sea. As the court below was careful to point out, Mr. Latsis's injury resulted from "such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician. If that physician is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling."[54]

The view that a worker hurt while working to further the mission of a vessel and assigned to that vessel for the duration of a sea voyage is entitled to the protection of the Jones Act[55] is fully consistent with this Court's other

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[52] 498 U.S. at 354 [quoting Chief Justice Stone's dissent in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946)].

[53] 498 U.S. at 354.

[54] 20 F.3d at 55, J.A. 239.

[55] If such a worker is not protected by the Jones Act, he may have little protection indeed. The Second Circuit's recent decision in Kollias v. D & G Marine Maintenance, 29 F.3d 67 (CA2 1994) holds that the Longshore and Harbor Workers' Compensation Act can apply to injuries on the high seas. This is a highly debatable holding because of language in the Longshore Act limiting its coverage to "navigable waters of the United States." 33 U.S.C. § 903(a). A petition for certiorari is pending in *Kollias*. If it turns out that the Longshore Act cannot redress an injury at sea, that will be all the more reason for insisting that the Jones Act must cover injuries like that sustained by Antonios Latsis.

seaman status decisions.[56] It is also broadly consistent with the seaman status jurisprudence of the courts of appeals.[57] This view provides a ready basis for resolving

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[56] See Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S.Ct. 486, 494 (1991) ("Because a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission – even one used exclusively in ship repair work – that worker may qualify as a Jones Act seaman."); Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 373 (1957) (upholding seaman status for a handyman on a stationary dredge and stating that "the jury could reasonably have believed that petitioner would have [nautical] responsibilities in the event that this dredge were moved. Whether petitioner would be a member of the dredge's crew while taking soundings during a trip is certainly a jury question. If he were a member during travel, he would not necessarily lack that status during anchorage."); Norton v. Warner Co., 321 U.S. 565, 567, 568 (1944) (holding that a bargeman was excluded from Longshore Act coverage by its "member of a crew of any vessel" language and emphasizing as particularly relevant the worker's duties while the barge was "being towed" or "in tow"); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 255, 260 (1940) (holding that a deckhand on a lighter used to provide coal to steamboats was not excluded from Longshore Act coverage by its "member of a crew" language and stressing that the worker "had no duties while the boat was in motion"); Warner v. Goltra, 293 U.S. 155, 157 (1934) (holding that the master of a river tug was a Jones Act seaman and stating: "In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.' ") [quoting The Buena Ventura, 243 F. 797, 799 (S.D.N.Y.1916)].

[57] Decisions in the First, Fifth, and Sixth Circuits provide explicit support for the view that a worker hurt during a voyage while assigned to further the vessel's mission for the duration of that voyage must be classified as a seaman. See DiGiovanni v.

the present case, one that does not require this Court to lay down any new law or to choose between the conflicting tests for seaman status of the Second and Fifth Circuits. Should this Court adopt this view, the proper disposition of this case would be a ruling as a matter of law that Latsis was a Jones Act seaman – it is undisputed that he was assigned to the Galileo for the full voyage, that he is suing for an injury incurred aboard the vessel on that voyage, and that his work contributed to the vessel's mission or function[58] – with a remand for trial on

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Traylor Brothers, Inc., 959 F.2d 1119, 1123 (CA1 1992), cert. denied, 113 S.Ct. 87 (1992) ("if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.") (emphasis in original); Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243, 245, 248 (CA5 1983), cert. denied, 464 U.S. 1069 (1984) (upholding seaman status for workers who performed "classical seaman's work" on a miscellany of small boats on very short voyages and relying in major part on the fact that each of "plaintiffs' tour[s] of duty with a vessel was for the duration of the vessel's mission.") See also Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 262 (CA5 1981) ("Roberts was apparently expected to stay aboard the barge until completion of the project."); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281-82 (CA5 1981); Davis v. Hill Engineering, Inc., 549 F.2d 314, 328 n. 23 (CA5 1977) ("Davis . . . continued his work on Hill's fabrication project after the onshore phase was completed by boarding the W-701 for the duration of the project."); Hatch v. Durocher Dock and Dredge, Inc., 33 F.3d 545, 547 (CA6 1994) (adopting the rule of the First Circuit's *DiGiovanni*, supra). The law in the other circuits is broadly consistent. For a complete presentation of the relevant cases from all of the circuits, see Appendix A, infra.

[58] See J.A. 211: "The parties have agreed that the work of the plaintiff aboard these ships was a contribution to the

the merits of his Jones Act negligence claim. Such a ruling would seem especially appropriate where, as was true here, the worker was hurt by a classic peril of the sea. Such a ruling would find additional support in the fact that defendant has actually acknowledged Mr. Latsis's status as a seaman for purposes of the relevant voyage. See Section II, below.

II. DEFENDANT HAS ACKNOWLEDGED THAT MR. LATSIS WAS A MEMBER OF THE CREW OF THE S.S. GALILEO.

It is common ground that a Jones Act "seaman" is defined as "a master or member of a crew of any vessel." *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 491 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946); David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, 86, 93 (1985). Defendant Chandris has acknowledged that Mr. Latsis was a member of the crew of the vessel Galileo at the time of his injury. On May 14, 1989 – the day the vessel left Baltimore and the ship's doctor examined Mr. Latsis's eye – the master, chief purser, and physician of the Galileo all signed a "Request for Medical Treatment" form describing Mr. Latsis as a "crew member" with the position of "supt. engineer."[59]

Evidence that an employer has treated an injured maritime worker as a seaman is highly probative that the

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functioning of the vessel and assisted in the accomplishment of its various missions."

[59] J.A. 208.

worker is indeed a seaman. See *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 367-68 (CA5 1982) (holding that evidence that the employer paid maintenance and cure to the injured worker was relevant to the Jones Act seaman status issue).

III. IN THE ALTERNATIVE: MR. LATSIS IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL JUDGE ERRED IN RULING THAT THE S.S. GALILEO WAS OUT OF NAVIGATION AS A MATTER OF LAW WHILE IN DRYDOCK AND IN CHARGING THE JURY TO IGNORE LATSIS'S SERVICES TO THE S.S. GALILEO IN DRYDOCK.

The trial judge told the jury: "In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation."[60] Plaintiff timely objected.[61] The court below determined that the "drydock instruction"[62] was erroneous. If this Court does not conclude (on the basis of points I and II above) that Latsis was a seaman as a matter of law, then it

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[60] J.A. 210. The trial judge did not explain the basis for this ruling but evidently relied on McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567 (CA9 1992). That case is readily distinguishable: A shipyard worker was hurt in a fire involving the hull of an oil drill ship that was being transformed into a fish processing ship – a seventeen-month-long project. That situation is a far cry from the present case, where the plaintiff was hurt by a classic peril of the sea during a sea voyage.

[61] 20 F.3d at 49, J.A. 224.

[62] 20 F.3d at 55, J.A. 238.

should affirm the decision below – reversing and remanding for a new trial on seaman status – because the trial court's handling of the drydock issue squarely conflicted with three of this Court's decisions.

The court below determined that the drydock instruction was erroneous because it conflicted with this Court's decision in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).[63]

In this determination the court below was correct. The *Wilander* Court expressly approved the portion of *Offshore Co. v. Robison*, 266 F.2d 769, 779 (CA5 1959) holding that a seaman is one whose duties "contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." The unanimous *Wilander* Court stated:

> [W]e believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.[64]

As the court below noted, a large chunk of Latsis's work for Chandris was taken up with contributing to the mission of the S.S. Galileo:

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[63] 20 F.3d at 55-56, J.A. 239-41.

[64] 498 U.S. at 355.

> During the course of Latsis's employment with Chandris . . . he spent some six months working seven days a week on board the vessel, supervising the project as the only naval architect, including the drydocking, bottom removal, cleaning and removal of the propellers, overhauling the main engines, rebuilding the boilers, and reconstructing the accommodation spaces and public rooms.[65]

The court below went on to say: "Why this time should not count in terms of determining the substantiality of his connection to the Chandris vessels, we do not know."[66]

Reversing on the basis of the trial judge's handling of the drydock issue was also correct on the further basis that the trial judge's ruling the Galileo out of navigation as a matter of law conflicted with this Court's decision in *Butler v. Whiteman*, 356 U.S. 271 (1958) (*per curiam*). In *Butler* the plaintiff sought to establish seaman status on the basis of her deceased husband's connection with the tug G.W. Whiteman. The deceased was "employed as a laborer doing odd jobs around respondent's wharf, and on the morning of the accident he had been engaged in cleaning the boiler of the tug."[67]

On the day of the accident and for the preceding ten months of decedent's employment by the defendant, the tug had been immobilized at defendant's dock – without the requisite Coast Guard operating certificate, without crew, without earnings, and without movement of any kind. Reversing a directed verdict for the defendant, this

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[65] 20 F.3d at 55-56, J.A. 240.

[66] 20 F.3d at 56, J.A. 240-41.

[67] *Butler*, 356 U.S. at 272 (Harlan, J., dissenting).

Court held that the record "presented an evidentiary basis for jury findings as to (1) whether or not the tug G.W. Whiteman was in navigation; [and] (2) whether or not the petitioner's decedent was a seaman and member of the crew of the tug within the meaning of the Jones Act."[68] Clearly under *Butler* the district judge in the present case erred by holding that the S.S. Galileo was "out of navigation" as a matter of law.

The trial judge's handling of the drydock issue was also clearly wrong under this Court's decision in *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370 (1957). The *Senko* plaintiff was a handyman on a dredge that had never moved during his entire period of employment. The dredge "was anchored to the shore at the time of petitioner's injury and during all the time petitioner worked for respondent. It is also true that this dredge, like most dredges, was not frequently in transit."[69]

Nevertheless, this Court upheld the handyman's seaman status because his "duty was primarily to maintain the dredge during its anchorage and for its future trips, and . . . he would have had a significant navigational function when the dredge was put in transit."[70]

Under *Wilander* it was wrong for the district court to rule Latsis's services to the Galileo in drydock out of consideration; these services bore significantly on the issue of Latsis's "contribut[ion] to the function of the vessel or to the accomplishment of its mission." Under *Butler* and *Senko* it was wrong for the district court to rule

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[68] 356 U.S. at 271. Citations and italics omitted.

[69] *Senko*, 352 U.S. at 372.

[70] Id. at 374.

that the S.S. Galileo was "out of navigation" as a matter of law: The Galileo was obviously much more "in navigation" during her time in Bremerhaven than were the wholly immobile and out-of-commission vessels involved in those two cases. The trial court's erroneous handling of the drydock issue therefore provides an independently sufficient basis for upholding the decision below.

IV. CHOOSING A TEST FOR SEAMAN STATUS: THE SECOND AND FIFTH CIRCUITS' CONFLICTING APPROACHES.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991), this Court held that "[t]he key to seaman status is employment-related connection to a vessel in navigation." The Second and Fifth Circuits disagree as to the nature of the required connection. Presumably certiorari was granted in this case to resolve that conflict.

In the decision below, the Second Circuit held that the district court committed plain error by charging the jury with a definition of seaman status taken from Fifth Circuit jurisprudence;[71] the district judge should have used the Second Circuit's test for seaman status, not the Fifth's. Under the Second Circuit's test as phrased in *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (CA2 1975), the worker must have "a more or less permanent connection with the ship." The court below determined that *Salgado* "remains the law of this circuit"[72] but is in need of clarification in light of this Court's decisions in

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[71] See 20 F.3d at 46, 52, 54-55; J.A. at 216-17, 232, 237-38.

[72] 20 F.3d at 46, J.A. 216.

Wilander and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991).[73]

The necessary clarification produced a test for seaman status that could be formally set forth as follows:

> We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.[74]

As the court below explained, the current Fifth Circuit test is "quite different."[75] The Fifth Circuit's test contains no reference to the worker's exposure to the hazards of the sea. Instead, it relies centrally on a relatively rigid requirement that the plaintiff have been "assigned permanently to a vessel . . . or [have] performed a substantial part of his work on the vessel."[76] In the Fifth Circuit nowadays, this requirement is interpreted "primarily, if not solely, in temporal terms."[77]

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[73] 20 F.3d at 56, J.A. 241.

[74] 20 F.3d at 57, J.A. 245.

[75] 20 F.3d at 52, J.A. 233.

[76] 20 F.3d at 54, J.A. 236, quoting Offshore Co. v. Robison, 266 F.2d 769, 779 (CA5 1959).

[77] 20 F.3d at 54, J.A. 236.

In this section of his brief plaintiff-respondent Antonios Latsis will show that the Second Circuit's approach to determining seaman status is superior to the Fifth's in three ways: (a) the Second Circuit's approach is faithful to this Court's *Wilander* and *Gizoni* decisions, whereas the Fifth Circuit's is not; (b) the Second Circuit's approach furthers the policy of the Jones Act, whereas the Fifth Circuit's thwarts it; and (c) the Second Circuit's test is much less prolix and confusing than the Fifth's.

A. The Decision Below is Faithful to Wilander and Gizoni

In the decision below the Second Circuit held that the trial judge erred in charging the jury that a worker seeking Jones Act seaman status must prove that he "was either permanently assigned to the vessel or performed a substantial part of his work on the vessel."[78] In the unanimous[79] view of the panel, the quoted language was erroneous for three reasons: (a) it was impermissibly narrower than the Second Circuit's longstanding test for seaman status, which had been satisfied with a showing that the injured worker had a "more or less permanent connection" with the vessel;[80] (b) by focusing the trier of

[78] 20 F.3d at 49, J.A. 223-24.

[79] Judge Kearse's dissent was on other grounds; she expressly agreed with the test for seaman status laid down in Judge Oakes's opinion. See 20 F.3d at 58, J.A. 246-47.

[80] See 20 F.3d at 46, J.A. 216-17: "[T]he 'more or less permanent connection' requirement articulated in Salgado [v. M.J. Rudolph Corp., 514 F.2d 750, 755 (CA2 1975)] remains the law of this circuit. In ignoring this formulation and adopting an

fact's inquiry solely on the worker's "temporal relation to the vessel"[81] it risked "frustrating the underlying policy of the Jones Act";[82] and (c) it did not reflect the principles articulated in this Court's *Wilander* and *Gizoni* decisions.[83] The court below went on to formulate a test for seaman

alternative formulation, the district court misapplied the law and committed plain error. This error resulted in substantial prejudice to Latsis because the jury was effectively instructed to determine the substantiality of Latsis's connection to the vessel solely on the basis of Latsis's temporal relationship with the vessel."

[81] 20 F.3d at 54, J.A. 237.

[82] 20 F.3d at 55, J.A. 238. The court below held that the jury charge was wrong both because it used the language of "permanent assignment or substantial work" and because it stated that Latsis's time with the vessel while it was in drydock did not count. The language at 20 F.3d 55, J.A. 238, addressed both features of the charge: "[T]his instruction *further emphasized* the putative seaman's temporal connection to the vessel at the risk of confusing the jury and frustrating the underlying policy of the Jones Act." (Emphasis added.)

[83] See 20 F.3d at 51, J.A. 230: "The [*Wilander*] Court did not adopt the *Robison* test in its entirety. Indeed, the Court cited, with apparent approval, the Robertson article [David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985)] which called for revision of the *Robison* test, stating that '[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.' [498 U.S. at 354]." See also 20 F.3d at 57, J.A. 243-44: "[T]he Fifth Circuit's adherence to a narrowly interpreted permanent assignment requirement has been criticized by the Supreme Court of Louisiana .... *Folse v. W. Atlas Int'l, Inc./Downhole Seismic Servs.*, 593 So.2d 341 (La.1992). * * * The [*Folse*] majority pointed out that *Wilander* did not mention more or less permanent attachment to a vessel or fleet of vessels, and that *Gizoni* cast further doubt on this requirement. . . . "

status (quoted above at footnote 74) that it believed *was* consistent with the principles of *Wilander* and *Gizoni* and with the policy of the Jones Act.

Notwithstanding the Second Circuit's careful efforts to articulate a seaman status test conforming to the principles of *Wilander* and *Gizoni*, defendant/petitioner attacks the decision below as inconsistent with *Wilander*. The attack is based centrally on language in the *Wilander* opinion stating that "land-based" workers are not Jones Act seamen. Parenthetically it should be noted that such language – if read in the woodenly literal way the defendant would have the Court read it – would result in eliminating virtually all Jones Act seamen; almost every sailor on earth is "land-based" in the sense that somewhere there is a terrestrial home to which the sailor repairs when not at sea.

More to the point, defendant is taking the *Wilander* "land-based" language out of context. This Court's post-*Wilander* decision in *Gizoni* alone makes that apparent. The *Gizoni* plaintiff worked for a ship repair facility in California. He spent his days there and went home to a safe bed ashore each night. He was held entitled to assert his seaman status because he worked on floating platforms that sometimes moved among vessels under repair at berths or in drydocks.[84] Clearly the *Gizoni* plaintiff was "land-based" in the present defendant's overly literal sense of the term. But he was not a "land-based" worker in the sense that the *Wilander* Court used the term.

The *Wilander* Court introduced the category of "land-based maritime workers" in the following passage, which

[84] See 112 S.Ct. at 489-90, 494.

explains that the Longshore and Harbor Workers Compensation Act (LHWCA) defined the Jones Act term "seaman" when it excluded from the coverage of the LHWCA "a master or member of a crew of any vessel":[85]

> In *International Stevedoring Co. v. Haverty*, 272 U.S. 50, (1926), the Court held that a stevedore is a "seaman" covered under the [Jones] Act when engaged in maritime employment. Haverty was a longshore worker injured while stowing freight in the hold of a docked vessel. The Court recognized that "as the word is commonly used, stevedores are not 'seamen.' " "But words are flexible. . . . We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

> Congress would, and did, however. Within six months of the decision in *Haverty*, Congress passed the . . . LHWCA. . . . The Act provides recovery for injury to a *broad range of land-based maritime workers* but explicitly excludes from its coverage "a master or member of a crew of any vessel." * * * "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

> With the passage of the LHWCA, Congress established a *clear distinction between land-based and sea-based maritime workers*. The latter, who

[85] 33 U.S.C. § 902(3)(G).

> owe their allegiance to a vessel and not *solely* to a land-based employer, are seamen.[86]

The foregoing passage shows that the *Wilander* Court used the term "land-based maritime workers" to refer to workers like Haverty: longshoremen or stevedores, whose involvement with ships is confined to loading and unloading stationary vessels moored to docks or anchored in quiet harbors. Mr. Latsis was clearly not a "land-based worker" in the *Wilander* Court's sense of the term.[87]

That the defendant's argument takes the *Wilander* "land-based" language out of context is made all the more apparent by the key passage in the *Wilander* opinion in which the Court's holding is set forth:

> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that *distinguish between land-based and sea-based maritime employees*. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that *"seaman" had been taken to include land-based employees*. There is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea . . . .
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> In his dissent in [Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872 (1946), which

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[86] 498 U.S. at 346-47. Emphasis added. Some citations omitted.

[87] As the court below pointed out, the principal importance of *Gizoni* in the present context is its omission of any requirement that the injured worker have a "permanent attachment" to a vessel. 20 F.3d at 57, J.A. 244.

> extended the general maritime law remedy of unseaworthiness, traditionally restricted to seamen, to longshoremen] Chief Justice Stone chastised the Court for failing to recognize the *distinct nature of land-based and sea-based employment*. Traditional seamen's remedies, he explained, have been "universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the *special hazards and disadvantages to which they who go down to sea in ships are subjected." It is this distinction that Congress recognized in the LHWCA and the Jones Act*. It also explains why all those with that "peculiar relationship to the vessel" are covered under the Jones Act, regardless of the particular job they perform.
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> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. *All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed*. See generally [David W.] Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985).[88]

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[88] 498 U.S. at 353-54. Emphasis added. Some citations omitted. The central premise of the Robertson law review article was this: "Exposure to the 'perils of the sea' and to risks attending the movement of vessels on navigable water are the

This key passage from *Wilander* confirms that in the Court's use of the term a "land-based employee" is someone like Haverty – an employee whose work does not confront him with the "special hazards" and "particular perils" to which seamen are subjected. It also shows that a worker like Latsis must be regarded as "sea-based": sea-based workers are those whose work regularly exposes them to the perils of the sea. The court below was careful to point out that "Latsis's employment did expose him to the perils of the sea – in fact, his injury was the result of such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician."[89]

The most important aspect of the opinion below is its careful attention to "the underlying policy of the Jones Act."[90] The *Wilander* opinion was the guiding light of the court below in that respect. In *Wilander*, this Court said that protecting seamen against the "particular perils" and "special hazards" characteristic of their work *is* the Act's

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distinguishing characteristics of a seaman's work." 64 Texas L. Rev. at 80. Professor Robertson argued that the courts should adopt a "new approach [to determining seaman status whereby] a worker would be a seaman (1) when a substantial part of his duties are performed on vessels, and (2) his work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable water." Id. at 120. For a description of Professor Robertson's proposal as "simplifying the [seaman status] inquiry," see Jack L. Allbritton, Seaman Status in *Wilander's* Wake, 68 Tulane L. Rev. 373, 379 n. 51 (1994). See also Id. at 374 n. 7. Elsewhere in the same article Mr. Allbritton appears to criticize Professor Robertson's proposal as "simplistic". Id. at 390 n. 114, 397.

[89] 20 F.3d at 55, J.A. 239.

[90] Id.

underlying policy.[91] The court below said exactly the same thing: "[T]o compensate those injured in the course of work exposing them to the perils of the sea" is "the spirit of the Jones Act."[92] Accordingly, the court below made regular exposure to "the hazards of the sea"[93] the fourth element of its four-part test for seaman status. The defendant's brief to this Court seeks to foster the impression that the third element of that four-part test – requiring the worker to show that his contribution to the vessel was substantial in terms of duration or nature – is its most important feature. No one who reads the opinion below with an unbiased eye could think that. In truth, all four elements of the new Second Circuit test are important, but it seems clear that the most important is the fourth – the hazards of the sea requirement. The entire thrust of the opinion below is that *Wilander* mandates careful focus on whether "the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea."[94] In addition to relying on this Court's language so stating, the opinion below repeatedly refers to David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985)[95] – and to this Court's apparently approving reference to that law review article in *Wilander*.[96] (As will be seen in Section

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[91] This is the entire thrust of the passage quoted above at note 88.

[92] 20 F.3d at 55, J.A. 239.

[93] Id. at 57, J.A. 245.

[94] Id.

[95] See 20 F.3d at 50, 51, 53 n. 3, 57, J.A. 226, 230, 233 n. 3, 243.

[96] See 20 F.3d at 51, J.A. 230, referring to *Wilander*, 498 U.S. at 354-55.

V-D, infra, the defendant's brief to this Court also relies heavily on the Robertson article in formulating a proposed test for seaman status with which the plaintiff largely agrees.) The central premise of Professor Robertson's article is that whether an injured worker's "work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable water"[97] should be the key element of the court's approach to determining seaman status.

B. The Fifth Circuit's Approach is Inferior

Judge Oakes's opinion for the court below spelled out the key difference between the Second and Fifth Circuit approaches: The current Fifth Circuit approach "frames the substantial connection issue primarily, if not solely, in temporal terms,"[98] whereas in the Second Circuit "the substantial connection requirement has not been interpreted . . . in a narrow temporal sense."[99] The trial judge's instruction in the present case was plain error because it turned the substantial connection issue "solely on the basis of Latsis's temporal relationship with the vessel."[100]

The Fifth Circuit's test was not always so narrowly and exclusively temporal. Until the 1986 en banc decision in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (CA5 1986), the Fifth Circuit used a "more or less permanent

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[97] 64 Texas L. Rev. at 120.

[98] 20 F.3d at 54, J.A. 236.

[99] 20 F.3d at 53, J.A. 234.

[100] 20 F.3d at 46, J.A. 217.

connection" approach and a "permanent assignment/substantial work" approach more or less interchangeably on the view that they were functionally identical.[101] In the pre-*Barrett* era the Fifth Circuit repeatedly stressed that "the word permanent has never been assigned a literal interpretation under the Jones Act and should not be given a wooden application, but rather, is to be used

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[101] Beginning with Offshore Co. v. Robison, 266 F.2d 769, 779 (CA5 1959), the test was normally phrased as requiring the putative seaman to have been "assigned permanently to a vessel . . . or [to have] performed a substantial part of his work on the vessel." But almost equally often the court used the "more or less permanent" phrasing. See e.g. Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243-44 & n. 8 (CA5 1983), cert. denied, 464 U.S. 1069 (1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455 (CA5 1982); Barrios v. Engine & Gas Compressor Services, Inc., 669 F.2d 350, 352 (CA5 1982); Watkins v. Pentzien, Inc., 660 F.2d 604, 606 (CA5 1981), cert. denied, 456 U.S. 944 (1982); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 280 (CA5 1981); Guidry v. Continental Oil Co., 640 F.2d 523, 528 & n. 14 (CA5 1981), cert. denied, 454 U.S. 818 (1981); Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452 (CA5 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 237 n. 2 (CA5 1974); Cox v. Otis Engineering Corp., 474 F.2d 613, 613 (CA5 1973); Barrios v. Louisiana Construction Materials Co., 465 F.2d 1157, 1161 (CA5 1972); Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958 (CA5 1971); Bodden v. Coordinated Caribbean Transport, Inc., 369 F.2d 273, 274 (CA5 1966). In Bouvier v. Krenz, 702 F.2d 89, 90 (CA5 1983), the court explained that the "permanent assignment/substantial work" test and the "more or less permanent connection" test are "essentially equivalent." See also David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 448-49 (1993) ("Permanent assignment and substantial work are alternative grounds; either will satisfy the criterion. Indeed the courts often collapse the two into a 'more or less permanent connection' standard.") (Italics omitted)

as an analytical starting point instead of a self-executing formula."[102] Jurists in the Fifth Circuit pointed out that the seaman status law of the Fifth and Second Circuits was the same in this respect:

> The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time.[103]

All that was meant by the "permanency" criterion in either circuit was that "the relationship between the individual and a particular vessel[104] must be substantial in point of time and work, nor merely sporadic."[105]

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[102] Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 261 (CA5 1981) (citing four other cases).

[103] Porche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624, 631 (E.D.La.1975) [Rubin, J., citing Weiss v. Central R.R. Co. of New Jersey, 235 F.2d 309 (CA2 1956)].

[104] As the court below pointed out, a suitable relationship between the individual and a fleet (identifiable group) of vessels would also suffice. See 20 F.3d at 53 & n. 3, J.A. 233 & n. 3. Petitioner's Brief on the Merits is mistaken in asserting (at p. 25) that the "genesis" of the fleet doctrine was Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (CA5 1983), cert. denied, 464 U.S. 1069 (1984). The fleet doctrine was born in Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523 (CA5 1960); it was expanded in *Bertrand*. See David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, p. 97 & n. 110, pp. 109-112 (1985).

[105] Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 261 (CA5 1981).

The *Barrett* decision took the law of the Fifth Circuit away from its prior approach and away from the law of the Second Circuit.[106] Since 1986 the Fifth Circuit's permanent assignment/substantial work test has become a narrowly temporal, purportedly "self-executing formula"[107] of the very sort so vigorously eschewed by the earlier decisions. As the court below noted,[108] the most dramatic proof of this development is the decision in *Bach v. Trident Steamship Co.*, 920 F.2d 322 (CA5 1991), vacated, 500 U.S. 949 (1991), reinstated, 947 F.2d 1290 (CA5 1991), cert. denied, 112 S.Ct. 1996 (1992). The *Bach* court denied seaman status to a compulsory Mississippi River pilot whose sole job was navigating oceangoing vessels on the river between New Orleans and Pilottown, near the mouth of the river. The court acknowledged that "Bach's case for seaman status has considerable intuitive appeal for two reasons: (i) his entire job was to perform an

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[106] Judge Rubin's dissent in *Barrett v. Chevron, U.S.A. Inc.*, 781 F.2d 1067 (CA5 1986) joined by five other judges, would have kept the former view in place: "[A worker's] status as a crew member, vel non, should be determined by considering the transitory duration or fixed term of the assignment, the nature of his duties during it, and the relationship of those duties to the mission of the vessel. * * * An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment." 781 F.2d at 1077. In an earlier decision written while he was a district judge, Judge Rubin had expressed the same view, citing in support of it the Second Circuit's decision in Weiss v. Central R.R. Co. of New Jersey, 235 F.2d 309 (CA2 1956). Similarly, Judge Oakes in the decision below relied upon *Weiss*. See 20 F.3d at 53-54, J.A. 235.

[107] See text at note 102 supra.

[108] 20 F.3d at 56, J.A. 241-42.

archetypical seaman function, the steering of an oceangoing vessel through navigable waters; and (ii) in performing his job, Bach regularly faced many of the hazards of life on the sea and the risks created by moving vessels through navigable waters."[109] Nevertheless, his lack of "the requisite [permanent] connection to a vessel or identifiable fleet of vessels"[110] kept him out of the seamen's legal protections: "[W]e have never held that seaman status is coextensive with exposure to seaman's risks."[111]

Cutting one who performs an "archetypical seaman function" and routinely undergoes the classic seamen's hazards out of the protection of the Jones Act on the basis of a narrowly temporal, more or less mechanically quantitative approach is fundamentally inconsistent with this Court's decision in *Wilander*, which stressed that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed."[112] The Second Circuit's test for seaman status would not countenance such a counter-intuitive and facially unfair outcome as the *Bach* case,[113] and is much to be preferred.

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[109] 920 F.2d at 324.

[110] 920 F.2d at 325.

[111] 920 F.2d at 325.

[112] 498 U.S. at 354.

[113] See Clark v. Solomon Navigation, Ltd., 631 F.Supp. 1275 (S.D.N.Y. 1986) (treating compulsory river pilot as seaman entitled to sue vessel for unseaworthiness). See also Ringering v. Compania Maritima De-La-Mancha, 670 F.Supp. 301 (D.Ore. 1987), aff'd, 848 F.2d 1243 (CA9 1988) (same). Cf. Evans v. United Arab Shipping Co. S.A.G., 4 F.3d 207 (CA3 1993), cert. denied, 114 S.Ct. 1065 (1994) (holding that a compulsory pilot is not an employee of the vessel for purposes of the Jones Act but

The Fifth Circuit now uses an approach to determining seaman status that tries unsuccessfully to be mechanically quantitative in perhaps three different senses. First, as indicated above, the permanent assignment/substantial work criterion has become narrowly temporal and quantitative; the sole measure is the percentage of work time the employee spent aboard a vessel or fleet.[114] Second, the definition of a "fleet" seems to entail a requirement that the number of vessels "acting together or under one control"[115] must be relatively small.[116] Third, in

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rather an independent contractor, and declining to reach the issue of seaman status). Cf. David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 451-52, 454-59 (1993) (criticizing the Fifth Circuit's *Bach* decision and arguing that compulsory pilots should be held to be seamen who are not employees of the shipowner; this resolution would entitle them to the warranty of seaworthiness but exclude them from the Jones Act and the law of maintenance and cure). But see Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (CA4 1991), cert. denied, 112 S.Ct. 1265 (1992) (denying seaman status to compulsory pilot).

[114] See e.g. Palmer v. Fayard Moving and Transportation Corp., 930 F.2d 437, 439 (CA5 1991) (denying seaman status to shipowner's public relations agent, injured aboard ship, who spent only 19% of her work time on the vessel); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1076 (CA5 1986) (denying seaman status to welder's helper who performed 20-30% of his duties on vessels).

[115] *Barrett*, supra, 781 F.2d at 1074.

[116] See e.g. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51, 52 (CA5 1992), cert. denied, 113 S.Ct. 1261-62 (1993) (rejecting the concept of a "six- or seven-thousand-vessel fleet"); Ardleigh v. Schlumberger Ltd., 832 F.2d 933, 934 (CA5 1987) (worker did 70% of his work on thirty different vessels; seaman status denied); Lirette v. N.L. Sperry Sun, Inc., 831 F.2d 554, 555-56 (CA5 1987) (denying

defining a "vessel" for purposes of the "member of a crew of any vessel" inquiry, the Fifth Circuit has begun using a prolix, elaborate, and ultimately highly ambiguous doctrinal apparatus[117] involving three "common attributes for nonvessels"[118] and "nine factors for vessel status."[119]

All of these cross-cutting efforts at quantification have produced something like chaos. Many pairs of Fifth Circuit decisions are facially inconsistent with one another.[120] There is a steady chorus of criticism in the law reviews,[121] to the effect that the Fifth Circuit's seaman

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seaman status to a worker who spent 75-80% of his time on twenty-three different floating drilling rigs); Langston v. Schlumberger Offshore Services, Inc., 809 F.2d 1192, 1194 (CA5 1987) (denying seaman status to a worker who spent 32% of her work time on fifteen vessels owned by ten unrelated owners).

[117] See the detailed explanation and criticism of this body of doctrine in David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 460-65 (1993); David W. Robertson, The Law of Seaman Status Clarified, 23 J. Mar. L. & Comm. 1, 11-16 (1992).

[118] Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 293 (CA5 1990).

[119] Id. at 294 n. 9.

[120] Compare e.g. Ducote v. V. Keeler & Co. Inc., 953 F.2d 1000 (CA5 1992), with Ellender v. Kiva Construction & Engineering, Inc., 909 F.2d 803 (CA5 1990). Also compare Ardleigh v. Schlumberger Ltd. 832 F.2d 933 (CA5 1987), with Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (CA5 1983), cert. denied, 464 U.S. 1069 (1984).

[121] See generally David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443 (1993); David W. Robertson, The Law of

status jurisprudence provides woefully little real guidance to lawyers and trial judges. One experienced practitioner, whose work is primarily in behalf of shipowners and similarly situated maritime defendants, has recently written:

> The *Barrett* test has proven to be clumsy, imprecise, and subject to considerable judicial gymnastics. Not only is it unpredictable, it has also caused a great deal of agonizing discovery and evidentiary battles over percentages of work by a given employee over long periods of time involving, in many cases, different jobs and vessels.[122]

This experienced maritime defense lawyer went on to state that the Fifth Circuit's jurisprudence on the definition of a vessel is similarly convoluted:

> Like the seaman status struggle, [the Fifth Circuit's approach to setting criteria for defining a vessel] has often been a confusing and tortured exercise in mental gymnastics.[123]

Seaman Status Clarified, 23 J. Mar. L. & Comm. 1 (1992); Kenneth G. Engerrand, Seaman Status Reconstructed, 32 So. Tex. L. Rev. 169 (1991); Eileen R. Madrid, Seaman Status: The Supreme Court Recharts its Course: *Wilander* and *Gizoni*, 51 La. L. Rev. 1149 (1991); Honorable Peter Beer, Keeping Up With the Jones Act, 61 Tulane L. Rev. 379 (1986); David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985); Kenneth G. Engerrand and Jeffrey R. Bale, Seaman Status Reconsidered, 24 So. Tex. L.J. 431 (1983).

[122] Jack L. Allbritton, Seaman Status in *Wilander's* Wake, 68 Tulane L. Rev. 373, 388-89 n. 110 (1994).

[123] Id. at 392. See also Id. at 397-402 (further detailing Fifth Circuit difficulties and confusion).

Seasoned district judges within the Fifth Circuit – some of whom are reported to have been involved with as many as thirteen thousand Jones Act filings over a ten year period[124] – are openly critical of the Circuit's lack of a meaningful or workable test for seaman status.[125]

V. PLAINTIFF'S RESPONSES TO SPECIFIC ARGUMENTS IN DEFENDANT'S MERITS BRIEF TO THIS COURT.

A. The "Plain Error" Point

Defendant/Petitioner's Brief on the Merits (pp. 12-14) appears to argue that this Court should limit its consideration of this case to deciding whether any error

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[124] See Honorable Peter Beer, Keeping Up With the Jones Act, 61 Tulane L. Rev. 379, 400 (1986).

[125] See e.g. Godeaux v. Dynamic Industries, Inc., 864 F. Supp. 614, 617 fn. 4 (E.D. Tex. 1994): "While the Robison test may appear uncomplicated and straightforward, its application and interpretation under seemingly similar fact scenarios have resulted in different outcomes" (citing cases). See also Judge Peter Beer's law review article, Keeping Up With the Jones Act, 61 Tulane L. Rev. 379 (1986). Judge Beer's article focuses on the pre-*Barrett* situation in the Fifth Circuit but states that *Barrett* is merely a "faintly perceptible swerve from the Circuit's prior jurisprudence." (p. 412). The Beer article is a veritable diatribe against the Fifth Circuit's law of seaman status, with the author referring to the Fifth Circuit Court as "intimidated" (p. 395), "timid and uncertain" (p. 396), prone to "eager judicial legislation" and "melodramatic prose" (p. 398). Judge Beer calls the Fifth Circuit's seaman status jurisprudence "tenuous" and "transitory" (p. 406) and sums the matter up thusly: "The current judicial definitions of seaman's status are a travesty that have tarnished the very forums in which the Jones Act is sought to be enforced." (p. 414).

in the trial court's charge to the jury was "plain" enough to warrant appellate review in light of plaintiff's failure to object to the charge as a whole.[126]

This point was not raised or even mentioned in the Petition for Writ of Certiorari; indeed, it is quite inconsistent with the Petition for Writ of Certiorari's presentation of this case as a vehicle for clearing up conflict and confusion in the law of seaman status. Plaintiff objects to defendant's attempt to inject the "plain error" issue at this stage and suggests that the issue is not properly before the Court.

Furthermore, it would "serve neither to promote the interests of justice nor to advance efficient judicial administration"[127] for this Court to limit itself to deciding whether plain error was committed in the present case. As was noted in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981), when an important and recurrent question of federal law has been fully briefed and argued in the Court of Appeals and fully briefed in this Court, "the interests of justice" and "efficient judicial administration" are often better served by the Court's giving plenary attention to the disputed substantive-law point.

In any event, the court below amply explained that the trial court's error was indeed "plain." By focusing the jury "solely on . . . Latsis's temporal relationship with the vessel" the trial judge caused "substantial prejudice" to

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[126] As indicated above, plaintiff did object to the "drydock" instruction.

[127] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 257 (1981).

Latsis.[128] "This prejudice was compounded by the district court's further instruction that the time the vessel was in drydock could not be considered."[129] Moreover, charging the jury in terms of Latsis's "assignment" rather than "connection" to a vessel "might have been particularly confusing to the jury because Latsis was not 'assigned' to the S.S. Galileo except temporarily from time to time. Rather he was responsible for a fleet of vessels as to which it has long been held a person may be a seaman."[130] Taken as a whole, the instructions given by the district judge narrowly "limited the jury's consideration to Latsis's temporal relation to the vessel. This substantially prejudiced Latsis."[131] "[T]he district court's instruction erroneously applied the law of this circuit regarding a core element of Latsis's claim – to the substantial prejudice of Latsis."[132]

The instructions were therefore subject to review and reversal under the "plain error" standard.

B. The Argument that the Court Below Invaded the Jury's Province

Defendant/Petitioner's Brief on the Merits (at pp. 9, 11) argues that the decision below should be reversed

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[128] 20 F.3d at 46, J.A. 217. See also 20 F.3d at 52, J.A. 232: "[T]he 'more or less permanent connection' formulation of the substantial connection requirement remains the law of this circuit. Therefore it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit. . . . "

[129] Id.

[130] 20 F.3d at 53 n. 4, J.A. 234 n. 4.

[131] 20 F.3d at 54, J.A. 237.

[132] 20 F.3d at 54-55, J.A. 238.

because it constitutes a "rebuke of the role of the jury" (p. 9) as that role was described in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355-56 (1991). In this respect defendant again misreads the *Wilander* opinion. The *Wilander* Court described the Jones Act jury's role as "applying the proper legal standard" to the seaman status issue. 498 U.S. at 356. The court below concluded that the trial court failed to furnish the jury with "the proper legal standard." Obviously a reversal and remand for a new trial under such circumstances cannot properly be regarded as invading the jury's legitimate province.

C. Defendant's Reliance on Out-of-Context Language

In discussing the conscientious effort of the court below to follow this Court's *Wilander* decision, plaintiff demonstrated above (in Section IV-A) that Defendant/Petitioner's Brief on the Merits is mistaken in taking *Wilander's* "land-based" language wholly out of context. Much the same demonstration is appropriate respecting Petitioner's Brief's reliance (at pp. 19-20) on "permanent connection" language taken out of context from this Court's decisions in *Wilander*, *Norton v. Warner Co.*, 321 U.S. 565 (1944), *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991).

Perhaps the first thing to note is that virtually no present-day member of the United States Merchant Marine could qualify as a seaman under the kind of "permanent connection" requirement defendant would have this Court adopt. John McPhee's remarkable book *Looking for a Ship* (Farrar Straus Giroux 1990) is a vivid demonstration that the

modern American merchant seaman seldom stays long with a single ship or employer; these men typically have short stints aboard a variety of ships. See especially pp. 4, 9, 10, 11-12 and 20-21, attached to this brief as Appendix B.

None of this Court's decisions furnishes the slightest support for defendant's proposed version of a "permanent connection" requirement. *Wilander* used the word "permanent"[133] in a quotation from *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192, 193 (CA5 1938), which held that a general laborer who worked eight hours a day on a harbor dredge and then went home each night was a seaman. In *Norton* this Court applied the term "permanent attachment"[134] to a man whose "duties consisted of taking general care of [a] barge" that "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia."[135] *Senko* used the language of "permanently attached"[136] to refer to a "handyman on a dredge anchored in a navigable river. His duties included general maintenance when the dredge was stationary. It moved infrequently, and had never moved during all the time [the *Senko*] plaintiff was working. Plaintiff lived ashore, went home every night, and was hurt while working ashore."[137] The "permanently attached" language in *Herb's Welding*[138] was a reference to a generic description of the relaxed "more or less permanent connection" jurisprudence of the Fifth Circuit in the pre-*Barrett*

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[133] 498 U.S. at 355.

[134] 321 U.S. at 573.

[135] Id. at 567.

[136] 352 U.S. at 372.

[137] David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, 89 (1985).

[138] 470 U.S. at 417 n. 2.

era.[139] Finally, the *Gizoni* Court used the language of "relationship and permanent"[140] to refer to a shipyard worker's connection to the group of floating platforms he sometimes rode as they moved short distances among vessels under repair at berths or in drydock at the ship repair facility. Like the workers who were classified as seamen in *Butler v. Whiteman*, 356 U.S. 271 (1958) (*per curiam*), *Maryland Casualty Company*, and *Senko*, the *Gizoni* plaintiff had a valid claim to seaman status despite being involved with vessels only at the shoreside and going to a safe home ashore each night.

Clearly none of the decisions from which defendant has gleaned the "permanent connection" language furnishes any support for cutting Mr. Latsis out of the seamen's protections. All of them used the language of permanency in the relaxed sense of the "more or less permanent connection" jurisprudence relied upon by the court below.

D. Defendant's Proposed Test for Seaman Status

Relying in major part on David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985), Defendant/Petitioner's Brief on the Merits (at pp. 22-28) proposes a seaman status test that would focus

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[139] See the discussion of that jurisprudence at text and notes 101-105, supra. The *Herb's Welding* Court used the word "permanent" in reference to the description of the Fifth Circuit's pre-*Barrett* jurisprudence in David W. Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Texas L. Rev. 973, 982-92 (1977).

[140] 112 S.Ct. at 490.

centrally on the putative seaman's exposure to the dangers characteristic of seamen's work. Plaintiff Antonios Latsis largely agrees with the defendant's proposal. The defendant's proposed test is remarkably similar to the test laid down by the court below. Perhaps it would be helpful to view them side by side:

Test set forth by court below:	*Defendant's proposed test:*
[T]he test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.[141]	A maritime worker is a seaman if the worker: (1) has a permanent employment connection to a vessel in navigation or performs a substantial part of his work on a vessel while exposed to marine perils *at sea* or to the dangers attendant to the movement of vessels on navigable waters; and (2) contributes to the function of the vessel or the accomplishment of its mission.[142]

A jury could readily find that Mr. Latsis was a seaman under either of those tests. He performed substantial

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[141] 20 F.3d 47, J.A. 245.

[142] Petitioner's Brief on the Merits at 28; emphasis in original

work on the S.S. Galileo and the other vessels in the Chandris fleet while being exposed to perils of the sea and vessel movement dangers; his contribution to the vessels' function or mission was substantial in terms of both duration and nature; and he was in fact injured by a peril of the sea.

This Court's unanimous *Wilander* opinion states that the policy of the Jones Act is to protect workers against "those particular perils" faced by "[a]ll who work at sea in the service of a ship." 498 U.S. at 354. No one seems to dispute what those "particular perils" are. Even the Fifth Circuit's highly controversial *Bach* decision (discussed supra at notes 108-13), acknowledged that what makes seamen distinctive is their exposure to "the hazards of life on the sea and the risks created by moving vessels through navigable waters." 920 F.2d at 324.[143] In Professor Robertson's most recent law review article on the problem of seaman status, he again urges that "[c]ourts and counsel should begin focusing on [the] policy [of protecting workers against the characteristic seamen's dangers] and making it an explicit part of their doctrinal formulations."[144] Both defendant Chandris in its brief to this Court and the Second Circuit in its opinion below

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[143] In a passage quoted approvingly in Petitioner's Brief on the Merits (at p. 22) and cited approvingly by this Court in *Wilander*, 498 U.S. at 354, David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, 80-81 (1985), identified the "characteristic seamen's dangers" as "perils of the sea" and the "risks attending the movement of vessels on navigable water."

[144] David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 446 (1993).

have heeded that call. If this Court chooses to use the present case as an opportunity to further clarify the law of seaman status, it can greatly assist lawyers and trial courts by setting forth an "exposure-to-seamen's-dangers" test in unequivocal terms. Plaintiff Latsis submits that in that respect the formulation of the court below is eminently suitable for adoption, provided it be understood that the phrase "hazards of the sea" is a term of art encompassing both deep-sea perils and the dangers incident to the movement of vessels on navigable water.

VI. PLAINTIFF'S RESPONSES TO THE AMICUS CURIAE BRIEFS SUPPORTING THE DEFENDANT.

A. Telling the Jones Act Jury About the Longshore Act

The main argument in the amicus brief filed by TECO Transport *et al.* is that Jones Act juries should be told that if they deny seaman status the injured worker will still be entitled to benefits under the Longshore and Harbor Workers' Compensation Act. See the TECO Amicus brief at pp. 4, 9, 14, 18, 20-22. This argument was not raised in any form in either of the courts below or in the Petition for Writ of Certiorari; on that basis alone, this Court should not consider it.

Furthermore, the amicus brief fails to inform the Court that in order to adopt TECO's proposed requirement the Court would have to overrule or drastically limit *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963). In *Tipton* this Court established that it is reversible error for a court in a seaman status case to admit evidence that the

plaintiff has accepted Longshore Act benefits; letting the jury know that a putative seaman "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act"[145] was highly prejudicial. It is significant that in the recent *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 493 (1991), this Court cited *Tipton* with apparent full approval.

B. Letting the Ship's Log Control

The amicus brief filed by the City of New York makes a fundamental conceptual error (at pp. 4, 8) in characterizing the seaman status issue as going to the district court's subject matter jurisdiction. As Justice Frankfurter pointed out in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959), this is a frequent error, but an error nonetheless: "[Plaintiff] asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights."

More importantly, the test for seaman status proposed in the City's amicus brief (at pp. 6, 23-29) – to treat as seamen only those listed as crew members on the vessel's log – would be absurdly narrow and would run afoul of one of the first principles in the seaman status jurisprudence: "[E]mployers cannot [be permitted to] prevent seamen from recovering under the Jones Act by

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[145] 375 U.S. at 35 (disapprovingly quoting defendant's counsel's argument to the jury).

[clever contractual or bookkeeping arrangements such as] by assigning them to different vessels or by making arrangements with third parties concerning the operation or navigation of the vessels upon which they serve." *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 248 (CA5 1983), cert. denied, 464 U.S. 1069 (1984).

CONCLUSION

The decision below – remanding this case for a new trial on Mr. Latsis's Jones Act claim – should be affirmed but modified to provide that Latsis was a Jones Act seaman as a matter of law. In the alternative, the decision below should be affirmed and the case remanded for a new trial under proper instructions to the jury on the issue of Latsis's status as a Jones Act seaman.

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APPENDIX A

DECISIONS OF LOWER FEDERAL COURTS BROADLY SUPPORTIVE OF THE VIEW THAT ANY WORKER ASSIGNED TO A VESSEL FOR THE DURATION OF A VOYAGE AND WHOSE DUTIES CONTRIBUTE TO THE VESSEL'S MISSION IS A SEAMAN RESPECTING INJURIES INCURRED ON THAT VOYAGE.

First Circuit

DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119, 1123 (CA1), cert. denied, 113 S.Ct. 87 (1992): "[i]f a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit". Emphasis in original.

Second Circuit

Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 755 (CA2 1975): The court upheld a bench trial determination that plaintiff was not a seaman and stated: "Salgado's presence on the R6 [a floating crane] was only for the purpose and duration of loading the freighter alongside."

Harney v. William H. Moore Building Corp., 359 F.2d 649, 655-56 (CA2 1966): The court held that a man whose job was to maintain cofferdam pumps on a stationary crane barge being used to build a bridge could be classified as a seaman.

Weiss v. Central Railroad Co. of New Jersey, 235 F.2d 309, 312 (CA2 1956): Upholding a bench trial determination that a

ferry deckhand was a seaman, the court stated: "We recognize that to be considered a 'seaman' for purposes of recovery under the Jones Act . . . the nature of a claimant's duties aboard a vessel is not controlling and that he need not be serving in a strictly navigational capacity." Citation omitted. Still, we know of no case where an employee whose duties consisted of actually operating the wheel of a vessel has been denied the designation of 'seaman,' as traditionally and universally associated with his position." Citation omitted.

United States v. Atlantic Transport Co., 188 F. 42, 43 (CA2 1911), cert. denied, 223 U.S. 724 (1911): "These 'horsemen,' like all others who sign a ship's articles for a voyage or a succession of voyages, being part of the ship's company, may be considered as seamen."

The J.S. Warden, 175 F. 314, 315 (S.D.N.Y.1910): Judge Learned Hand classified a bartender as a seaman and explained that all who "equally further the purpose of [a ship's] voyage" are entitled to the seamen's protections.

But see *Kollias v. Bay Tankers, Inc.*, 742 F.2d 1441 (CA2 1984), cert. denied, 469 U.S. 1073 (1984): This was an unreported decision, not permitted to be cited or relied upon under the Second Circuit's rules, that apparently upheld the denial of seaman status to a repairman who was hurt while on a voyage from Galveston, Texas, to Long Beach, California. See the discussion of *Kollias v. Bay Tankers* in *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 75 (CA2 1994) (upholding Longshore Act coverage) (cert. petition pending).

Third Circuit

Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, 1251 (CA3 1994): The court denied seaman status to a worker assigned to a dredge on a non-navigable lake strictly because it *was* a non-navigable lake. The court laid down a new test for seaman status designed to take *Wilander* into account, to wit: "[F]or Reeves to establish himself as a seaman, he must demonstrate that at the time of his injury: (a) he maintained a more or less permanent connection on (b) a vessel in navigation; and (c) that his employment contributed to the function of the vessel or the accomplishment of its mission."

Fourth Circuit

Harwood v. Patredereit A.F. 15.5.81, 944 F.2d 1187, 1192 (CA4 1991), cert. denied, 112 S.Ct. 1265 (1992): Denying seaman status to a compulsory pilot hurt trying to board a Danish ship to pilot her into Hampton Roads, the court relied on the Fourth Circuit's pre-*Wilander* test for seaman status requiring that "1) the worker must be more or less permanently attached to a vessel or fleet; 2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and 3) the vessel must be in navigation."

Fifth Circuit

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243, 245, 248 (CA5 1983), cert. denied, 464 U.S. 1069 (1984): Upholding seaman status for workers who performed "classical seaman's work" on a miscellany of

small boats on very short voyages, the court relied in major part on the fact that each of "plaintiffs' tour[s] of duty with a vessel was for the duration of the vessel's mission."

Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 262 (CA5 1981): "Roberts was apparently expected to stay aboard the barge until completion of the project."

Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281-82 (CA5 1981).

Davis v. Hill Engineering, Inc., 549 F.2d 314, 328 n. 23 (CA5 1977): "Davis . . . continued his work on Hill's fabrication project after the onshore phase was completed by boarding the W-701 for the duration of the project."

Porche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624, 630 (E.D.La.1975): Judge Rubin held that a worker who had never been to sea before and who died on his first day of work while trying to board the pipe-lay barge to which he had been assigned was a seaman as a matter of law. He explained: "The decedent was to serve aboard the RB-2 as a temporary replacement; his service, however, was to be for an indefinite period of time – until the regular welder was able to return. This uncontradicted evidence establishes that the decedent's connection was 'more or less permanent.' The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time. See Weiss v. Central R.R. Co. v. New Jersey, 2d Cir. 1956, 235 F.2d 309.".

Sixth Circuit

Hatch v. Durocher Dock and Dredge, Inc., 33 F.3d 545, 547 (CA6 1994): The court adopted the rule of the First Circuit's *DiGiovanni*, supra.

Seventh Circuit

Rufolo v. Midwest Marine Contractor, Inc., 6 F.3d 448, 453 (CA7 1993), vacated on other grounds, 114 S.Ct. 1609 (1994): The court held that a pilot on a spud barge being moved from Kenosha, Wisconsin, to Evanston, Illinois, was a Jones Act seaman.

Eighth Circuit

Roth v. U.S.S. Great Lake Fleet, Inc., 25 F.3d 707, 708, 709 (CA8 1994): Denying seaman status to a temporary worker hired to paint Great Lakes ships laid up for the winter, the court explained that the worker "had no expectation that he would ship out when the ships eventually left the dock after the spring thaw." The court adopted a test for seaman status requiring that "1) the injured worker must perform at least a substantial part of his work on any floating structure used for transport in navigable waters; and 2) his work must contribute to the function of the vessel or the accomplishment of its mission.".

Ninth Circuit

McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567, 569 (CA9 1992): The court denied seaman status to a worker hurt in a shipyard fire aboard the hull of an oil drill ship

being converted to a fish processing ship on the view that the vessel was not in navigation. The court set forth a test for seaman status requiring that "(1) the vessel on which the claimant was employed must be in navigation; [and] (2) the claimant must have a more or less permanent connection with the vessel. . . . "

Ringering v. Compania Maritima De-La-Mancha, 670 F.Supp. 301 (D.Ore.1987), aff'd, 848 F.2d 1243 (CA9 1988): The court treated a Columbia River pilot as a Jones Act seaman.

Eleventh Circuit

O'Boyle v. United States, 993 F.2d 211, 213-14 (CA11 1993): The court denied seaman status to an American biologist required by treaty to be carried as observer on a Japanese driftnet fishing ship because the biologist "was not performing the ship's work nor furthering its purpose." The court set forth a test for seaman status requiring that the worker "(1) . . . must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed . . . must contribute to the function of the vessel. . . . "

APPENDIX B

EXCERPTS FROM JOHN McPHEE'S *LOOKING FOR A SHIP* (FARRAR STRAUS GIROUX 1990)

The older the card [date stamped upon leaving the last ship], the better the prospects for a new job. If the card were to go twelve months unused, it would roll over – lose all seniority, and begin again. In the evolving decline of the United States Merchant Marine, qualified people seeking work so greatly outnumbered the jobs there were to fill that you almost had to hold a killer card or your chances were slim for shipping out. You went to a union hall, presented the card in person at a job call, and if someone tossed in an older card you stayed on the beach. *Id.*, p. 4.

* * *

. . . by terms then set by the union, the six months of work were followed by six of obligatory vacation.

And then another six of utter frustration looking for a ship. . . . [A third mate] needed work so badly that he signed up as an able-bodied seaman on an integrated tug-barge operating between Perth Amboy and Duluth. He was a licensed officer of ocean ships on his way to the Great Lakes as a deckhand on a barge.

To provide jobs of any kind for its increasingly distressed mariners, the Masters, Mates, and Pilots union arranged for five oceangoing tankers to be crewed with union members, right down to the last deckie. Licensed officers accepted jobs as ordinary seamen, able-bodied seamen, and bosuns because they could not get other work. *Id.*, p. 9.

* * *

The United States Merchant Marine, the name of which suggests an assault on a valuable foreign beach, is not, as a good many people seem to think, a branch of the military service. It is essentially a collective enterprise of competing private companies, flying the American flag on the sterns of their ships, employing American-citizen crews, and transporting cargoes throughout the world. Sail and steam, the United States grew in rank among nations on the aggressive reach of its Merchant Marine. American merchant ships once numbered in the thousands. *Id.*, p. 10.

* * *

Diminishing rapidly, the number of American dry-cargo ships was already below two hundred, and there were about as many tankers. Not one commercial vessel was under construction in an American shipyard.

In time of war, the Merchant Marine is a prominent participant. . . . Afterward, the ships go out of service more rapidly than the sailors, and jobs are hard to come by. The unions close their membership books until numbers level out. By the late nineteen-seventies, the Second World War crowd was gone, and much of the Vietnam crowd. Books opened. . . . In the mid-eighties, 'everything slammed shut again' as the United States Merchant Marine was competitively out-bid by ships under foreign flags and was reduced to carrying less than five per cent of all oceangoing American cargo. One American company after another entered Chapter 11 with its keel up and its screws in the air. Soon the Soviet merchant fleet was carrying at least ten times as much

American cargo as the United States Merchant Marine, in direct trade between the two countries – a multiple that keeps growing through time. *Id.*, pp. 11-12.

* * *

Captains and most chief mates are 'permanent.' They take enforced vacations like everybody else – but at the owners' behest – they return to their specific ships. With rare exceptions, no second mates or third mates are permanent. Many unlicensed personnel have permanent jobs; most do not. *Id.*, pp. 20-21.

(10)

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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and
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Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONERS' REPLY BRIEF

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For The Second Circuit

PETITIONERS' REPLY BRIEF

REPLY TO MR. LATSIS' BRIEF ON THE MERITS

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries

imposed by federal legislation. These statutes both direct and delimit our actions.

Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

THE VOYAGE SEAMAN TEST PROPOSED BY MR. LATSIS IS CONTRARY TO EXISTING PRECEDENT.

Since the jury in the District Court determined that Mr. Latsis was not a seaman within the meaning of the Jones Act, 46 U.S.C. § 688, Mr. Latsis has championed any theory, even inconsistent theories, that will allow Mr. Latsis to avoid the jury's decision. Predictably, in Mr. Latsis' Brief In Opposition to Chandris' Petition, Mr. Latsis boldly proclaimed that "[t]he Decision Of The [Second Circuit] Court Of Appeals Is Proper."[1] However, the first argument in Mr. Latsis' Brief on the Merits proposes a test that conflicts with the Latsis Seaman Test set forth in *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994), *cert. granted*, 115 S.Ct. 354 (1994).

In abandoning the Latsis Seaman Test, Mr. Latsis argues for a seaman test that is seductive in its simplicity. Mr. Latsis' newest seaman test would require a court to find that a maritime worker is a seaman if the worker (a) is injured during a voyage, (b) is assigned to the vessel for the duration of the voyage, and (c) contributes to the vessel's mission during the voyage (the "Voyage Test").

Mr. Latsis provides no analysis regarding the legal basis for the Voyage Test nor any practical examples regarding how the test would apply to the real marine world where thousands of special purpose vessels and structures have no fixed or definite "voyages." The only "support" that Mr. Latsis provides for the Voyage Test is (a) the cases cited in footnotes 56 and 57 and in Appendix A and (b) a policy argument that the Voyage Test fulfills the goal of the Jones Act, which Mr. Latsis alleges is to protect *all* maritime workers exposed to the "special hazards" and "particular perils" characteristic of

---

[1] Respondent's Brief in Opposition, page 11.

work on vessels at sea regardless of the worker's employment-related connection to a vessel in navigation.

Contrary to Mr. Latsis' position, none of the cases cited by Mr. Latsis in footnotes 56 and 57 or in Appendix A provide any support for the Voyage Test.[2] The authority cited

---

[2] *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (reversible error to determine seaman solely on the basis of worker's job description); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (whether vessel is connected to the shore or on a voyage when worker is injured is not controlling on issue of seaman status); *Norton v. Warner Co.*, 321 U.S. 565 (1944) (bargeman's seaman status determined on the basis of his duties aboard vessel and the permanency of his attachment to the vessel); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) (inconsistent with Voyage Test); *Warner v. Goltra*, 293 U.S. 155 (1934) (whether the master of a vessel is a seaman within the meaning of the Jones Act); *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 87 (1992) (seaman status determined solely by examining the nature and purpose of the vessel to which the maritime worker was attached); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) (fleet doctrine case); *Roberts v. Williams-McWilliams Co., Inc.*, 648 F.2d 255 (5th Cir. 1981) (welder's status as a seaman determined solely on the basis that he was permanently assigned to vessel); *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981) (question of fact existed regarding whether welder on offshore construction job was permanently assigned to a fleet of derrick barges); *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977) (reversed summary judgment for defendant where there was evidence that welder was permanently assigned to a derrick barge); *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545 (6th Cir. 1994) (denied seaman status to worker who lacked an employment-related connection to a vessel in navigation); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975) (denied seaman status to worker not more or less permanently assigned to vessel); *Harney v. William M. Moore Building Corporation*, 359 F.2d 649 (2d Cir. 1966) (denial of seaman status as a matter of law improper under Three-part or Salgado Seaman Test); *Weiss v. Central Railroad Company of New Jersey*, 235 F.2d 309 (2d Cir. 1956) (examined entire course of worker's employment in determining seaman status); *United States v. Atlantic Transport Co.*, 188 F. 42 (2d Cir. 1911), *cert. denied*, 223 U.S. 724 (1911) (whether aliens employed aboard ship are seamen for purpose of immigration act); *The J.S. Warden*, 175 F. 314 (S.D.N.Y. 1910) (bartender

by Mr. Latsis is inapposite.[3] In fact, the cases that actually analyze the relationship necessary to establish seaman status are virtually unanimous in holding that seaman status is determined by looking at the maritime worker's entire employment and not at a "snapshot" of where the worker is located or what the worker is doing at the exact point in time of the injury.[4] When not an advocate for Mr. Latsis, even

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cannot be denied seaman status solely because he did not engage in the navigation of the ship); *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3d Cir. 1994) (fleet doctrine case explaining that situs of injury is nondeterminative of seaman status); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) (pilot was not a seaman because he lacked permanent attachment to vessel); *Porche v. Gulf Mississippi Marine Corp.*, 390 F.Supp. 624 (E.D. La. 1975) (welder's seaman status determined solely on the basis of the permanency of his assignment to vessel); *Rufolo v. Midwest Marine Contractor*, 6 F.3d 448 (7th Cir. 1993) (pilot's status as a seaman was not at issue); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707 (8th Cir. 1994) (temporary service laborer denied seaman status based on the lack of a definite and permanent vessel connection); *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992) (seaman status denied solely on the basis that the vessel was not in navigation); *Ringering v. Compania Maritima De-La-Mancha*, 670 F.Supp. 301 (D. Or. 1987), *aff'd*, 848 F.2d 1243 (9th Cir. 1988) (pilot's status as a seaman determined on the basis that pilot was on board to navigate the vessel and was more or less permanently connected to vessel), and *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993) (inconsistent with Voyage Test).

[3] Also, Appendix A violates Rule 24.3, Supreme Court Rules.

[4] *Reeves*, 26 F.3d 1247; *Easley v. Southern Shipbuilding Corp.*, 936 F.2d 839, 843-845 (5th Cir. 1991), *vacated and remanded*, 112 S.Ct. 1463 (1992), *aff'd*, *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 4-5 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *New v. Associated Painting Services, Inc.*, 863 F.2d 1205, 1208 (5th Cir. 1989); *Miller v. Patton-Tuily Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988); *Smith v. Nicklos Drilling Co.*, 841 F.2d 598, 599 (5th Cir. 1988), *cert. denied*, 488 U.S. 956 (1988); *Lormand v. Superior Oil Co.*, 845 F.2d 536, 540-541 (5th Cir. 1987); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1027-1028 (5th Cir. 1987); *Langston v. Schlumberger Offshore Services, Inc.*, 809 F.2d 1192, 1193-1194 (5th Cir. 1987); *In re Putton-Tully Transp. Co.*, 797 F.2d

Professor David W. Robertson ("Professor Robertson") agrees that "[t]he site of the injury is not determinative; seamen hurt on platforms or even ashore are still seamen, and nonseamen hurt on vessels are still not seamen." David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 997 (1977) (footnotes omitted).

Mr. Latsis' policy argument that *all* maritime workers exposed to "special hazards" at sea should receive seaman's remedies is also contrary to existing precedent. *Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994); *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38 (2d Cir. 1982). In both *Kollias* and *Cove Tankers*, the Second Circuit held that maritime workers conducting repairs during a voyage at sea are entitled to compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"). *Kollias*, 29 F.3d at 75; *Cove Tankers*, 683 F.2d at 39.

Prior to his representation of Mr. Latsis, Professor Robertson admitted the following:

> [I agree with] the overwhelming weight of authority in taking it as given that seaman status cannot be established by any worker who fails to demonstrate that a significant portion of his work was done aboard a vessel. Some workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seamen's protections.

David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 93 (1985) (footnote omitted).

206, 210 (5th Cir. 1986); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307, 311 (5th Cir. 1984); *Bouvier v. Krenz*, 702 F.2d 89, 90 (5th Cir. 1983); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980); *Dean v. McKie Co.*, 771 F.Supp. 466, 471 (D. Mass. 1991); *Reecer v. McKinnon Bridge Co.*, 745 F.Supp. 485, 492 (M.D. Tenn. 1990). *But see Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989) (distinguished by *Reeves*, 26 F.3d at 1258 n.16).

Whether or not a maritime worker is exposed to "special hazards" or "particular perils" at the time of his injury is not the *sole* basis for determining whether a maritime worker is a seaman. This Court has held repeatedly that seaman status is determined by a maritime worker's employment activities and not the worker's physical location at the time of his injury. *Braen v. Pfeifer*, 361 U.S. 129, 131-133 (1959) (seaman status not determined by nature of seaman's duties at the time of the injury or situs of injury); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 372-373 (1956) (determining maritime worker was not a seaman as a matter of law was error even though accident occurred on shore where question of fact existed regarding worker's permanent attachment to vessel); *Warren v. United States*, 340 U.S. 523, 529-530 (1951) (maritime worker injured in dance hall on shore leave entitled to seaman's remedy of maintenance and cure); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 736-737 (1943) (right to recover seaman's remedy of maintenance and cure does not depend on place where injury occurs); *O'Donnell v. Great Lakes Dredge & Co.*, 318 U.S. 36, 42-43 (1943) (seaman status depends on the nature of the service and its relationship to the operation of the vessel on navigable waters and not on the location of worker when the injury occurs). *Accord Higginbotham v. Mobil Oil Corporation*, 545 F.2d 422, 433 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978) (neither the situs of the employee's work nor the place of injury is determinative of seaman status). Rather, "[t]he key to seaman status is employment-related connection to a vessel in navigation." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991).

The Voyage Test utilizes a "snapshot" or "point-of-rest" analysis to determine seaman status that is contrary to the plain meaning of *Wilander*. Under the Voyage Test, a court would focus on the putative seaman's situs or location at the exact time of his injury regardless of the length of the maritime worker's employment-related connection to a vessel in navigation. Although *Wilander* did not specifically define the employment-related connection to a vessel necessary for a

maritime worker to establish seaman status, *Wilander* contradicts Mr. Latsis' simplistic approach. 498 U.S. at 354-355.

Important statements in *Wilander* regarding the test for seaman status are as follows:

> There is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen *who owe allegiance to a vessel at sea*, but who do not aid in navigation.
>
> * * *
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, *solely in terms of the employee's connection to a vessel in navigation.*
>
> * * *
>
> All who work *at sea in the service of a ship* face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.
>
> * * *
>
> It is *not the employee's particular job* that is determinative, *but the employee's connection to a vessel.*
>
> * * *
>
> The key to seaman status is *employment-related connection to a vessel* in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel.
>
> * * *
>
> "There is implied a *definite and permanent connection with the vessel*, an obligation to forward her enterprise."

498 U.S. at 354-355 (emphasis added). *Wilander* does not support Mr. Latsis' argument that participating in a voyage

transforms a land-based maritime worker, who spends 90% of his time ashore, into a seaman.

The statements that appear in *Wilander* are consistent with analyzing the employment relationship between the maritime worker and a vessel and are inconsistent with the proposition that a maritime worker's seaman status is dependent on whether he is on a voyage. "[A]llegiance to a vessel at sea," "solely in terms of the employee's connection to a vessel in navigation," "at sea in the service of a ship," "not the employee's particular job . . . but the employee's connection to a vessel," "employment-related connection to a vessel" and "definite and permanent connection with the vessel" are not synonymous with the Voyage Test's "injured during a voyage" element. The *Wilander* descriptions are consistent with an analysis of the worker's employment-related connection to a vessel during the worker's entire "course of employment." Indeed, the LHWCA and the Jones Act specifically provide remedies to maritime workers injured in the "course of employment" and "course of [their] employment," respectively. 33 U.S.C. § 902(2); 46 U.S.C. § 688; *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 4-5 (1946). *See also Braen*, 361 U.S. at 131-133; *O'Donnell*, 318 U.S. at 42-43.

As the Third Circuit Court of Appeals states:

> [T]he Supreme Court held that occurrence of the injury on land was not material, rather Jones Act coverage depended only on a finding that the injured party was "an employee of the vessel, engaged in the course of his employment" at the time of the injury.
>
> * * *
>
> As the Supreme Court has recognized, stripping seaman status from such an employee, or allowing that same employee to oscillate between seaman and non-seaman status, is not only elusive, but in the face of injury would be a travesty of justice.

Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, 1255-1256 (3rd Cir. 1994) (citations omitted) (footnote omitted). Thus, any rule regarding seaman status that ignores

the maritime worker's activities during the "course of his employment" and focuses solely on the maritime worker's place of injury is contrary to Supreme Court precedent, the LHWCA and the Jones Act. *Reeves*, 26 F.3d at 1255-1256. *See also Braen*, 361 U.S. 129; *Senko*, 352 U.S. at 373; *Warren*, 340 U.S. at 516; *Aguilar*, 318 U.S. 724; *O'Donnell*, 318 U.S. 36.

Another flaw in the Voyage Test is exposed if the Voyage Test is applied to the facts in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991). Mr. Gizoni would arguably obtain seaman status anytime that he was sailing on a "voyage" aboard the work platforms. Conversely, assuming that Mr. Gizoni returned to shore at the end of a "voyage" to obtain supplies or perform shoreside work, Mr. Gizoni would become a longshoreman. Assuming this transition occurred numerous times each day, Mr. Gizoni would fall in and out of Jones Act coverage and in and out of LHWCA coverage countless times each day. Although this "strobe light" of Jones Act/LHWCA coverage suits Mr. Latsis' purpose in this case, the Voyage Test conflicts with the LHWCA and Supreme Court precedent and would create a legal nightmare for the employees, employers, juries and courts required to differentiate between seamen and longshoremen.[5]

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[5] Also, the Voyage Test fails maritime workers who are seaman if the "vessel" does not engage in a "voyage." A maritime worker who is assigned permanently to, or who performs a substantial part of his work aboard, a submersible drilling rig is a seaman. *See, e.g., Colomb v. Texaco, Inc.*, 736 F.2d 218, 221 (5th Cir. 1984); *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984). However, under the Voyage Test, the drilling worker is not a seaman because there is no "voyage." Even if "voyage" is not defined as a "journey across water" and the voyage is defined as the entire time the drilling rig is stationed at sea, the worker would fail the Voyage Test because the worker would not be assigned "for the duration of the [drilling rig's] voyage."

Under the Voyage Test, even lawyers are "seamen." If an attorney with knowledge of the conditions that sometimes cause accidents aboard cruise ships is hired by a shipowner to perform a safety inspection of the owner's cruise ship, if the lawyer performs the inspection while the vessel

Although *Wilander* did not define the employment-related connection necessary for a maritime worker to qualify as a seaman in all respects, this Court's prior holdings and policy statements regarding whether Congress intended for maritime workers to walk in and out of LHWCA coverage is unequivocal. *Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 317 n.26 (1983); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 83 n.18 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 273-276 (1977). *See also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 371 (7th Cir. 1980). As *Northeast* states:

> The [LHWCA] focuses primarily on occupations - longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity.
>
> * * *
>
> [T]o exclude [the maritime worker] from the [LHWCA's] coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.
>
> * * *

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is sailing between Nassau, Bahamas and Miami, Florida, and if the attorney is injured during that voyage, the attorney is a "seaman" under the Voyage Test. The Voyage Test bestows seaman status on the lawyer because the lawyer is injured during a voyage, is assigned to the vessel for the duration of the voyage, and contributes to the mission of the vessel, which is transporting passengers safely. The Voyage Test must be scuttled.

> [P]etitioners fail to give effect to the obvious desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a "longshoring operation." The theory does not comport with the [LHWCA's] focus on occupations and its desire for uniformity. . . . "The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point-of-rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered."

432 U.S. at 273-276. "Congress was especially concerned that some workers might walk in and walk out of coverage." *Pfeiffer*, 444 U.S. at 83 n.18. "[T]he compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." *Perini*, 459 U.S. at 317 n.26. Therefore, "whether an individual is a maritime employee for purposes of LHWCA coverage is controlled by analysis of his 'basic' employment, rather than the employee's particular work at the moment of the accident." *Brockington*, 903 F.2d at 1528.

Mr. Latsis' invitation to this Court to adopt the Voyage Test is a Trojan horse. The Voyage Test has no resolving power. The only persons aboard a vessel during a voyage that are excluded from the Voyage Test are passengers and stowaways. The Voyage Test is based on the same intuitively attractive logic and policies that this Court accepted in *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926) and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and that Congress rejected in 1926 and 1972 with the passage of, and the amendment to, the LHWCA. *See Wilander*, 498 U.S. at 347-348. Apparently encouraged by the Court's willingness in 1926 and 1946 to confer seaman status on land-based maritime workers based solely on their exposure to seamen's hazards and without any regard to the worker's lack of employment-related connection to a vessel in navigation, Mr. Latsis urges the same result in the instant case.

Congress' rebuke of *Haverty*, *Sieracki* and the policy urged by Mr. Latsis is clear. *Wilander*, 498 U.S. at 347-348. The LHWCA provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes seamen from its coverage. *Wilander*, 498 U.S. at 347; 33 U.S.C. § 902(3)(G). Thus, regardless of the similarity between the dangers faced by land-based maritime workers and seamen, the two classes of workers are mutually exclusive. *Wilander*, 498 U.S. at 347, 353; *Swanson*, 328 U.S. at 7-8. Any seaman test that confers seaman status on a maritime worker based *solely* on the argument that the putative seaman is exposed to the perils of the sea readopts the mistaken logic of *Haverty* and *Sieracki* and contravenes the express mandate of the LHWCA. *See Wilander*, 498 U.S. at 347-348, 354.

THE JURY REJECTED MR. LATSIS' ARGUMENT THAT THE CHANDRIS REQUEST FOR MEDICAL TREATMENT FORM CONTROLS THE ISSUE OF SEAMAN STATUS.

The jury considered and rejected Mr. Latsis' argument that Chandris' medical treatment form controls Mr. Latsis' work status. Certainly, Mr. Latsis would not agree that the request for medical treatment form would govern this case if the ship's physician had crossed out "crewmember" and written in "land-based worker" or "longshoreman." Any rule based on titles or labels would unfairly restrict Jones Act and LHWCA remedies in future cases. More importantly, this Court has already rejected Mr. Latsis' argument. *Gizoni*, 502 U.S. at ___, 112 S.Ct. at 494 (determining seaman status as a matter of law on the basis of job title or description is reversible error).

IN DETERMINING MR. LATSIS' SEAMAN STATUS, MR. LATSIS' WORK ACTIVITIES SUBSEQUENT TO HIS INJURY ARE IRRELEVANT.

The trial judge's instruction to the jury regarding Mr. Latsis' post-accident work aboard the drydock in Bremerhaven, Germany was proper. Mr. Latsis' post-injury work is not relevant to his status as a seaman. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190-191 (1952). In addressing the question of whether plaintiff Desper had obtained seaman status at the time of his accident, *Desper* states:

> To be sure, [Desper] was a probable navigator in the near future, but the law does not cover probable or expectant seamen but seamen in being. It is our conclusion that while engaged in such seasonal repair work Desper was not a "seaman" within the purview of the Jones Act.
>
> * * *
>
> "The fact that [Desper] had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature."

342 U.S. at 190-191. Mr. Latsis' assertion that seaman status is determined by examining the injured worker's activities subsequent to the injury is unsupportable.[6]

Alternatively, the S/S GALILEO was withdrawn from navigation as a matter of law while in the drydock in Germany. The rebuilding of the S/S GALILEO occurred between October 1989 and March 1990 at a cost of $65 million. (J.A. 91, 134-135, 200). The specifications for the rebuilding were "telephone-book-size." (J.A. 94). The "major modifications" of the S/S GALILEO involved the removal of the vessel from navigable waters followed by the removal of the ship's bottom plates, removal of the ship's propellers, adding bow

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[6] *Desper*, 342 U.S. at 190-191; *Reeves*, 26 F.2d at 1257 n.13 (3d Cir. 1994); *Smith*, 841 F.2d 599-600; *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 453 (5th Cir. 1980); *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 365-366 (5th Cir. 1982); *Ramos v. Delmar Systems, Inc.*, 596 F.Supp. 1105, 1106 (W.D. La. 1984), *aff'd*, 750 F.2d 389 (5th Cir. 1985).

thrusters to the ship, overhauling the main engines, rebuilding the boilers, adding new air conditioners and satellite communication, totally reconstructing the cabins, adding lounges and reconstructing the dining rooms. (J.A. 51-53, 91, 134, 198-200). On these undisputed facts, the S/S GALILEO was not "in navigation" while in drydock as a matter of law.[7]

THE ROBISON SEAMAN TEST PROVIDES THE BEST STARTING POINT FOR DISTINGUISHING BETWEEN LAND-BASED AND SEA-BASED MARITIME WORKERS.

The District Court's jury instruction was based on the Fifth Circuit's Robison Seaman Test. In criticizing the District Court's jury instruction and the Robison Seaman Test, Mr. Latsis complains that the instruction was impermissibly more narrow than the Second Circuit's Three-part or Salgado Seaman Test as set forth in *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975). Furthermore, Mr. Latsis and the Second Circuit assert that the District Court instruction unfairly focused the jury's inquiry on Mr. Latsis' temporal relation to the Chandris fleet and ignored the principles in *Wilander* and *Gizoni*.

The irony of Mr. Latsis' criticism of the District Court's failure to adhere to the Three-part or Salgado Seaman Test is that neither the Voyage Test nor the Latsis Seaman Test adopt or incorporate any portion of the Three-part or Salgado Seaman Test.

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[7] *West v. United States*, 361 U.S. 118 (1959); *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 570-571 (9th Cir. 1992); *Boyd v. Ford Motor Co.*, 948 F.2d 283 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1481 (1992); *Wixom v. Boland Marine & Mfg. Co., Inc.*, 614 F.2d 956 (5th Cir. 1980); *Hodges v. S.S. Tillie Lykes*, 512 F.2d 1279 (5th Cir. 1975); *McClendon v. OMI Offshore Marine Service*, 807 F.Supp. 1266 (E.D. Tex. 1992); *Warwick v. Huthnance Div., Grace Offshore Co.*, 760 F.Supp. 571 (W.D. La. 1991).

Likewise, Mr. Latsis and the Second Circuit's criticism of the temporal aspect of the Robison Seaman Test is misplaced. Neither Mr. Latsis nor the Second Circuit address the fundamental flaw inherent in their position. Specifically, the final element of the conjunctive Latsis Seaman Test requires that the "course of the plaintiff's employment *regularly expose[]* the plaintiff to the hazards of the sea." *Latsis*, 20 F.3d at 57 (emphasis added). "Regularly" is defined as "at fixed and certain intervals, regular in point of time. In accordance with some consistent or periodical rule or practice." Black's Law Dictionary 1286 (6th ed. 1990). "Regularly" is undoubtedly a "temporal" word. Notwithstanding Mr. Latsis and the Second Circuit's criticism of the temporal aspect of the Robison Seaman Test, the Second Circuit discarded the permanent or substantial vessel-related connection requirement of the Robison Seaman Test and substituted the requirement that the putative seaman's employment "regularly expose[]" the maritime worker to the hazards of the sea. *Latsis*, 20 F.3d at 57. The Second Circuit substituted one temporal element for another time requirement.

Unfortunately, in order to obtain the result desired by Mr. Latsis and the Second Circuit, the "regularly exposed" language in the Latsis Seaman Test was ignored. No rational explanation exists regarding how a maritime worker who spends 90% percent of his time ashore is "*regularly exposed* . . . to the hazards of the sea."

THE ROBISON SEAMAN TEST IS THE SEMINAL STATUS TEST IN THE UNITED STATES.

Because of the enormous volume of seaman cases confronting the Fifth Circuit, that court has necessarily taken the lead in formulating rules and policy regarding seaman status. Before Professor Robertson became an advocate for Mr. Latsis, Professor Robertson described the Robison Seaman Test as a "synthesi[s] [of] the Supreme Court[] and [the Fifth Circuit's] seaman status jurisprudence into an approach that 'has stood the test of . . . time.' " David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 2

(1992). Although Professor Robertson now criticizes the Robison Seaman Test as conflicting with *Wilander's* "vessel connection" mandate, too restrictive, and disfavored, Professor Robertson and other commentators state an opposite opinion when providing an unbiased analysis. Professor Robertson and other commentators state as follows:

> [The Robison Seaman Test] is a vessel-connection test. Robertson, 64 Tex. L. Rev. at 96.
>
> * * *
>
> *Wilander* affirms that the "master or member of a crew of any vessel" language must be dealt with in *Robison* terms . . . Robertson, 23 J. Mar. L. & Com. at 23 (footnote omitted).
>
> * * *
>
> [The Robison Seaman Test] is a *liberal* test . . . Robertson, 23 J. Mar. L. & Com. at 3 (emphasis added) (footnote omitted).
>
> * * *
>
> The *Robison* formulation quickly became the authoritative statement of the criteria for seaman status in the Fifth Circuit, and has been highly influential in most of the other circuits. Because the overwhelming majority of the seaman status cases have arisen in the courts of the Fifth Circuit, courts in other circuits have generally relied on Fifth Circuit decisions. Robertson, 64 Tex. L. Rev. at 95 (footnotes omitted).
>
> * * *
>
> *Robison* has been referred to as the "grandfather of Jones Act cases" and was heavily relied on in *Wilander* . . . James A. George, *Wilander-Light at the End of the Labyrinth*, 16 Tul. Mar. L. J. 131, 146 (1991) (footnote omitted).
>
> * * *
>
> The *Robison* test for seaman status, as modified in *Barrett v. Chevron U.S.A., Inc.*, described below,

> has been the accepted standard in the Fifth Circuit for thirty years. *Barrett* has been generally followed in most other circuits. . . . In fact, *Robison* has been followed in legions of cases in the First, Second, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. . . . [T]he *Robison* formula has withstood the test of time. It has also withstood serious attacks on its foundations in several intervening cases, all as witnessed by "its long line of descendants." George, 16 Tul. Mar. L. J. at 149 (footnotes omitted).
>
> * * *
>
> In its essentials the *Robison* [Seaman] [T]est was approved by the Supreme Court. This is readily seen when the two tests are set out side by side; . . . Thus the *Robison* first "prong," the "permanent assignment"/"substantial part of his work" requirement, is a legitimate way of determining "employment-related connection to a vessel." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6-9 at 262 (2d ed. 1994) (footnote omitted).
>
> * * *
>
> The Supreme Court opinion in *Wilander* mandates a Jones Act seaman status formulation consistent in both analysis and result with the existing Fifth Circuit test which denies seaman status to land-based workers who have no permanent assignment to a vessel or identifiable fleet of vessels. Eileen R. Madrid, *Seaman Status: The Supreme Court Recharts Its Course: Wilander and Gizoni*, 51 La. L. Rev. 1149, 1166 (1991).

ANY JURY REQUIRED TO DETERMINE THE STATUS OF A MARITIME WORKER IN FUTURE CASES SHOULD RECEIVE AN INSTRUCTION THAT THE LHWCA AND THE JONES ACT ARE MUTUALLY EXCLUSIVE.

In *Wilander*, this Court stated clearly that the LHWCA and the Jones Act are mutually exclusive. *Wilander*, 498 U.S. at 353. Moreover, *Wilander* reaffirms that seaman status is ordinarily a question of fact. *Wilander*, 498 U.S. at 355-356. As amicus curiae TECO Transport and Trade Corporation, et al. asserts, if juries are expected to fulfill the significant responsibility of determining seaman status, it is anomalous to fail to fully apprise the jury of the legal ramifications of its decision. Chandris agrees. The jury should receive an instruction that a maritime worker claiming seaman status is either a seaman under the Jones Act or a longshoreman under the LHWCA.

If a putative seaman elects to try his case before an admiralty court or before a judge in a civil court, the judge sits as the finder of fact. Undoubtedly, the judge is aware that his choice is not between finding that (a) the maritime worker is a Jones Act seaman who is entitled to a remedy or (b) the maritime worker is not a seaman and without a remedy. The judge knows that the Jones Act and the LHWCA are mutually exclusive and that the maritime worker will either receive seaman's remedies or compensation benefits at a level determined by Congress.[8] If a jury is responsible for making a reasoned decision based on the law, no policy reason militates in favor of shielding the jury from the truth. The jury should know that its choice is between two alternative statutory schemes.

In an effort to perpetuate the extreme prejudice to shipowners that is created when juries who are determining seaman status are "kept in the dark" regarding the maritime

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[8] Also, the maritime worker may have a claim under Section 905(b) of the LHWCA.

worker's alternative remedies, Mr. Latsis criticizes the suggestion made by TECO Transport and cites *Gizoni*, 502 U.S. 81, and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), in support of his position. Mr. Latsis argues that *Gizoni* and *Socony* create a judicial bar preventing juries from knowing the import of their decision when determining seaman status. The holding in *Gizoni* and *Socony* is not so broad.

Gizoni and *Socony* hold that the court should not allow the jury to know that the maritime worker seeking seaman status has (a) *requested* or (b) *received* LHWCA benefits. If the jury knows that the maritime worker requested or received LHWCA benefits, the maritime worker might be prejudiced. The jury might assume that, if the maritime worker requested longshore benefits, the worker himself believes that he is a longshoreman and not a seaman. Likewise, if the jury knows that the maritime worker has already received longshore benefits, the jury might conclude that the maritime worker who is also seeking seaman's remedies at trial is attempting to "have his cake and eat it too." *Gizoni* and *Socony* hold that the potential prejudice arising from these two scenarios outweighs the shipowner's right to present the actual facts and law to the jury.

Conversely, the instruction urged by TECO Transport in future cases would not mention whether the maritime worker requested or received LHWCA benefits. The instruction urged by TECO Transport would merely allow the court to inform the jury that the maritime worker seeking seaman status is either a seaman under the Jones Act or a longshoreman/harborworker under the LHWCA. This instruction avoids the concerns articulated in *Gizoni* and *Socony* and avoids the extreme prejudice to shipowners that results when, by the court's silence, the jury is misled into believing that its determination that a maritime worker is not a seaman precludes the worker from receiving any remedy.

CONCLUSION

The judgment of the Second Circuit should be reversed and the District Court jury verdict and judgment should be reinstated.

Respectfully submitted,

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NO. 94-325

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,
Petitioners

versus

ANTONIOS LATSIS,
Respondent

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MISCELLANEOUS:

Allbritton, "Seaman Status in Wilander's Wake,"
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QUESTION PRESENTED

What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a Jones Act "seaman" under 46 U.S.C. §688?

STATEMENT OF INTEREST

The question left open in McDermott International, Inc. v. Wilander[1] and now before this Court — namely, the nature and extent of the employment-related connexity to a vessel required for "seaman" status under the Jones Act — is of vital interest to amici curiae and to the entire maritime industry.

TECO Transport & Trade Corporation is engaged in the water transportation, storage, terminalling, and transfer of coal and other bulk commodities through its four subsidiaries, Gulfcoast Transit Company, Mid-South Towing Company, Electro-Coal Transfer Corporation, and GC Service Company, Inc. Gulfcoast Transit Company owns and operates a fleet of U.S. flag ocean-going tugs and barges. Mid-South Towing Company owns and operates a fleet of inland river towboats and barges, and operates a barge fleeting facility on the Ohio River. Electro-Coal Transfer Corporation operates the nation's second largest coal storage and transloading terminal on the Mississippi River, and is engaged in the loading, offloading, and transferring of bulk commodities to and from inland river barges, ocean-going barges, and ocean-going ships. GC Service Company,

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[1] 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991)

Inc. provides stevedoring and longshoring services for Gulfcoast Transit's vessels, and performs maintenance and repair services on those vessels at the request of Gulfcoast Transit.

TECO Transport & Trade Corporation and its subsidiaries employ a variety of workers, some of whom are employed as Jones Act "seamen" aboard company owned and operated vessels, and others of whom are employed as "harbor workers" assigned to load, offload and on occasion repair and maintain those vessels. On occasion, this latter group of employees assert claims under the Jones Act, notwithstanding their "employee" status under the LHWCA, on the theory that they are "more or less permanently assigned to or substantially connected to an identifiable fleet of vessels."[2] Litigants and courts continually find themselves confronting the problem of alleged "seaman" status because there is a lack of a clear and comprehensive definition of the term "seaman."[3]

The broad test of "seaman" status advanced by the Second Circuit in Latsis v. Chandris, Inc.[4] is disturbing to amici curiae in that their traditional "harbor worker" employees, whom Congress intended to be covered by the LHWCA, may be found

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[2] See, e.g., Campo v. Electro-Coal Transfer Corp., 955 F.2d 10 (5th Cir. 1990), cert. granted and vacated, 112 S.Ct. 858, 116 L.Ed. 2d 766 (1992), on remand, 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed. 2d 978 (1988); Murray v. Gulfcoast Transit Co., 529 So.2d 784 (Fla.App. 2d Dist. 1988).

[3] Allbritton, "Seaman Status in Wilander's Wake," 68 Tul. L.Rev. 373 (1994).

[4] 20 F.3d 45 (2d Cir. 1994)

to be "seamen" under that test, although those employees have been held not to be Jones Act seamen under the Fifth Circuit's Robison test.[5] The Second Circuit's test results in a confusing jury instruction because it relies on a "more or less" standard and because it does not allow for the negative inference that the claimant also may not be a seaman but instead a LHWCA "employee."

Unlike the litigants in the case at bar, the TECO companies are in a position to view the legal ramifications of the question presented in a much broader and different perspective, since they actually employ both "seamen" and "harbor workers" in the conduct of their business operations. The Court's decision to the question here presented will have a broader application than to the limited factual situation presented in this case, and will directly impact the TECO companies in the conduct of their business operations, regardless of whether the Court upholds the Latsis test, the Robison test, or even creates a new test for determining seaman status. Accordingly, the TECO companies show they are vitally concerned in the question presented by this case.[6]

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[5] Compare Latsis v. Chandris, Inc. with Campo v. Electro-Coal transfer Corp., 955 F.2d 10 (5th Cir. 1990), cert. granted and vacated, 112 S.Ct. 858, 116 L.Ed. 2d 766 (1992), on remand, 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993).

[6] Amici Curiae have obtained the consent of both petitioner and respondent to file this brief, per the correspondence already on file with the Clerk of Court.

SUMMARY OF THE ARGUMENT

The Court needs to create a comprehensive legal test for determining "seaman" status under the Jones Act. The broad test employed by the Second Circuit in Latsis v. Chandris, Inc. is completely contrary to this Court's pronouncements in McDermott International, Inc. v. Wilander, and therefore should be rejected.

Amici curiae suggest the following test as more in keeping with Wilander's pronouncements:

> A maritime worker is a "seaman" under the Jones Act, if the worker can establish —
>
> 1. The worker is permanently assigned to a vessel* that is in navigation or otherwise has a substantial employment connection to that vessel.
>
> 2. The work performed contributes to the function of the vessel or to the accomplishment of its mission.
>
> 3. The worker's assignment to the vessel and the worker's contribution to the vessel exposes the worker to perils peculiar to the sea.

*(or an identifiable group of vessels, acting together or under one control)

However, any test adopted by this Court should provide for a jury instruction that allows the jury to consider a non-seaman's status as well. Otherwise, the "sea-based workers versus land-based workers" dichotomy inherent in the Jones Act and LHWCA becomes meaningless.

ARGUMENT

What are the distinguishing characteristics that make one maritime worker a seaman and another a harbor worker? That is the question presented in this case and left unresolved and unanswered in McDermott International, Inc. v. Wilander[7]. A clear and precise answer will furnish everyone with the ingredients necessary to determine who will be entitled to Jones Act benefits and who will be a harbor worker.

The legal tests presently in use are unsatisfactory and are violative of Wilander, as demonstrated throughout this brief. Amici curiae offer a new test:

> A maritime worker is a "seaman" under the Jones Act, if the worker can establish —
>
> 1. The worker is permanently assigned to a vessel* that is in navigation or otherwise has a substantial employment connection to that vessel.
>
> 2. The work performed contributes to the function of the vessel or to the accomplishment of its mission.
>
> 3. The worker's assignment to the vessel and the worker's contribution to the vessel exposes the worker to perils peculiar to the sea.

*(or identifiable group of vessels acting together or under one control)

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[7] 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed. 2d 866 (1991)

This legal test maintains the "sea-based workers versus land-based workers" dichotomy inherent in both the Jones Act and the LHWCA, and is consistent with the legal test for "employee" under the LHWCA[8].

In formulating the definition for Jones Act "seaman" status, this Court is asked to resolve the conflict between the test presently used by the Fifth Circuit Court of Appeal as set forth in Offshore Co. v. Robison[9], and the test employed by the Second Circuit Court of Appeal in the case at bar. The Robison test and the Latsis test are both used in terms of when the status issue should be submitted to the jury, and both tests are utilized in the actual instruction to the jury. The inherent problem with both tests is that they are not articulated in terms of what should be told to the jury so that they can decide who is and who is not a "seaman."[10] The Fifth Circuit's Robison test provides:

> There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission,

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[8] 33 U.S.C. §902(3). See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977).

[9] 266 F.2d 769 (5th Cir. 1959)

[10] The jury is never told the worker can be a LHWCA "employee." See 33 U.S.C. §902(3).

> or to the operation or welfare of the vessel in terms of its maintenance during its movement or doing anchorage for its future trips.[11]

The Second Circuit's Latsis test provides:

> [Jones Act status requires] ". . . a more or less permanent connection with a vessel . . ."
>
> . . . .
>
> The test [of seaman status] will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea. Latsis v. Chandris Inc. 20 F.3d at 57.[12]

The Robison test requires: (1) the maritime worker must be permanently assigned to a vessel in navigation or perform a substantial part of his work on the vessel; and (2) the worker must contribute to the function of the vessel or the accomplishment of

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[11] Offshore Co. v. Robison, 266 F.2d at 779. The second part of the Robison test was expressly approved in Wilander.

[12] Latsis v. Chandris Inc., 20 F.3d at 57.

its mission.[13] The first part of Robison is at issue here, and is stated in the disjunctive and is formulated in terms of the worker being either "permanently assigned" to a vessel or "performing a substantial portion of his work" on the vessel. This portion of the Robison test allows the putative seaman two ways of meeting his status — he can qualify either by fulfilling the "permanent assignment" requirement or fulfilling the "substantial work equivalent" requirement. Wilander did not discuss Robison's "substantial work" alternative. It is the "substantial work performed on a vessel" requirement that preoccupies most of the cases, and in order to satisfy this requirement, the Fifth Circuit requires the claimant to show that he performed a significant part of his work aboard the vessel "with at least some degree of regularity and continuity" and "in the context of his entire employment" with his current employer.[14]

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[13] Accord, Barrett v. Chevron USA, Inc., 781 F.2d 1067 (5th Cir. 1986). Barrett refines Robison to allow the worker to establish his work relationship to "an identifiable group of vessels acting together or under one control." Barrett, 781 F.2d at 1074.

[14] Barrett v. Chevron USA, Inc., 781 F.2d 1067, 1073-74 (5th Cir. 1986). Robison's "substantial part of his work" requirement is designed to exclude from Jones Act coverage those who are only randomly assigned to a vessel or whose presence aboard a vessel is of a transitory or sporadic nature. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51, 53 (5th Cir. 1992), cert. denied, 113 S.Ct. 1261 (1993); Barrett v. Chevron USA, Inc., 781 F.2d 1067, 1074 (5th Cir. 1986). Unfortunately, by failing to equally consider both the amount of time spent aboard the vessel and the nature of the work being performed aboard the vessel in determining what is "substantial," the Robison test fails in its purpose. See Allbritton, "Seaman Status in Wilander's Wake," 68 Tul.L.Rev. 373 (1994).

The Latsis test requires the maritime worker to establish: (1) that he contributed to the function of the vessel or to the accomplishment of its mission, (2) that his contribution was limited to a particular vessel or identifiable group of vessels, (3) that his contribution was substantial in terms of its duration or nature, and (4) he was regularly exposed to the perils of the sea. The third and fourth elements comprise the Second Circuit's general requirement that the worker must show "a more or less permanent connection to a vessel." The third and fourth parts of the Latsis test are formulated in terms of the worker being "more or less permanently connected" with the vessel, and the worker meets this standard by showing that his contribution to the vessel was substantial either in terms of its duration or in its nature.

Robison speaks in terms of "permanent assignment" and "substantial performance," while Latsis is more expansive and speaks in generalized terms of "a more or less permanent connection." The distinction is not a matter of mere semantics, since even the Second Circuit acknowledges that the plaintiff in the case at bar would not constitute a Jones Act seaman if the Robison test were applied.[15] However, both tests are deficient since both tests fail to instruct the jury that the worker can also be a LHWCA "employee."

I. Wilander's guidance and requirements for formulating a legal test

In Wilander, the Court held that one need not aid in the navigation of the vessel in order to qualify as a Jones Act seaman.

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[15] The Second Circuit overturned a jury verdict, based on the district court's Robison test jury instruction, that the plaintiff was not a Jones Act seaman. See Latsis v. Chandris, Inc., 20 F.3d at 52 & 54.

The Court's holding was a narrow one, since the Court was only asked to consider whether Jones Act seaman status required the worker's duties be "in aid of navigation" of a vessel. The Court in Wilander was not asked to fashion a comprehensive standard for Jones Act status, nor did the Court attempt to do so.

However, in rejecting the "aid to navigation" requirement, the Court stated that the term "seaman" was defined solely in terms of the employee's connection to a vessel in navigation, and that a necessary element of that connection was that the employee perform "the work of the vessel," that is, that the employee's duties contribute to the function of the vessel or to the accomplishment of its mission.

Although expressly refusing to define a comprehensive "status" definition, the Court in Wilander nevertheless did set forth certain parameters to provide guidance to the federal and state courts for the formulation of the legal standard:

> "... the Jones Act and the LHWCA are mutually exclusive."[16]
>
> "'Master or member of a crew' [in the LHWCA] is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act.... the key requirement for Jones Act coverage now appears in another statute [LHWCA]."[17]

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[16] 498 U.S. at 347, 111 S.Ct. at 813, 112 L.Ed. 2d at 877.

[17] 498 U.S. at 347, 111 S.Ct. at 813, 112 L.Ed. 2d at 877.

"With the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seaman."[18]

". . . Seamen do not include land-based workers."[19]

"... 'master or member of a crew' [in LHWCA] restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee."[20]

"We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees.[21]

"Traditional seaman's remedies . . . have been 'universally recognized as . . . growing ot of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards

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[18] 498 U.S. at 347, 111 S.Ct. at 813, 112 L.Ed. 2d at 877.

[19] 498 U.S. at 348, 111 S.Ct. at 814, 112 L.Ed. 2d at 878.

[20] 498 U.S. at 348, 111 S.Ct. at 814, 112 L.Ed. 2d at 878.

[21] 498 U.S. at 353, 111 S.Ct. at 817, 112 L.Ed. 2d at 881.

and disadvantages to which they who go down to the sea in ships are subjected. It is this distinction that Congress recognized in the LHWCA and the Jones Act.'"[22]

". . . all those with that 'peculiar relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform."[23]

"We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation.[24]

"All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed."[25]

"It is not the employee's particular job that is determinative, but the employee's connection to a vessel."[26]

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[22] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[23] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[24] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[25] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[26] 498 U.S. at 354, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

> "The key to seaman status is employment-related connection to a vessel in navigation. . . . we hold that a necessary element of the connection is that a seaman perform the work of a vessel."[27]
>
> "There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise."[28]
>
> ". . . a seaman must be doing the ship's work."[29]

In Wilander, the Court recognized and reaffirmed the mutual exclusivity between the Jones Act and the LHWCA, yet at the same time, the Court found the phrase "member of a crew of any vessel" used in the LHWCA to be synonymous with the term "seaman" used in the Jones Act. However, notwithstanding the mutual exclusivity of the two statutes, the Court in Southwest Marine, Inc. v. Gizoni[30] held that a maritime "employee" under the LHWCA could nevertheless qualify as a "seaman" under the Jones Act, where there was an evidentiary basis that the worker had the requisite connection to a vessel required for Jones Act seaman status, regardless of the fact that the worker's employment function was enumerated in the LHWCA. In Gizoni, the Court held that the worker's status could not be determined as a matter of law simply because the worker's occupation was specifically

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[27] 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[28] 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882, quoting Maryland Cas. Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938).

[29] 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882.

[30] 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991).

enumerated in the LHWCA, if there was an evidentiary basis that the worker had an employment connection to a vessel. Although the Court did not formulate a test for "seaman" status nor expand further its discussion in Wilander, the Court reemphasized its pronouncements in Wilander that Jones Act seaman status required an "employment-related connection to a vessel in navigation."[31]

Wilander (and Gizoni) requires that any test for Jones Act status must recognize and maintain the "sea-based worker/land-based worker" distinction inherent in the respective coverages of the Jones Act and LHWCA. Any proposed test which cannot maintain this distinction, while at the same time focusing on the nature and duration of the worker's employment connection to a vessel, will be unsatisfactory.

II. The Second Circuit's Latsis test is contrary to Wilander

Despite the Second Circuit's attempt to follow Wilander, the Latsis test falls far short of constituting the appropriate standard for determining seaman status. The Second Circuit's "more or less permanent connection with a vessel" is insufficient to meet Wilander's standards. In fact, as the Second Circuit's application of its test in Latsis v. Chandris readily demonstrates, the Second Circuit's test is much broader than what Wilander requires and allows harbor workers to become seamen simply on the basis of job description and work on a vessel.

The weakness of the Second Circuit's test is realized in that court's application of the test to the Latsis facts. The Court found Latsis "was connected to a vessel in navigation" because

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[31] 112 S.Ct. at 492, 116 L.Ed. 2d at 415.

he was "doing the ship's work" at the time of his injury, namely acting as a supervising engineer on board the vessel.[32] The Second Circuit's conclusion that Latsis qualified as a "seaman" represents a fundamental lack of understanding on the part of that court as to the nature of the work performed on ships by the ship's master and crew and the work performed on ships by the shipowner's managerial employees, independent contractors and specialists, and reflects a fundamental misunderstanding as to Latsis' employment function and his relationship to the vessel — hence, the short- coming of the Second Circuit's test.

Although officially characterized as a "supervising engineer," Latsis was nothing more than a "port engineer," a low level managerial employee whose job it is on behalf of the owner to periodically go aboard company-owned vessels to ensure that company practices and procedures regarding maintenance and repair are followed on board the ship and to provide office liaison with the vessels in connection with required maintenance and repair. Clearly, Latsis was a shoreside worker assigned to occasionally go aboard his employer's vessels. The Second Circuit simply considered whether this activity constituted "substantial connection to a vessel," without regard to whether it was "ship's work" or "owner's work." Latsis's time on the vessel was transitory and sporadic, depending solely on the occurrence of some maintenance and repair problem aboard ship requiring his shoreside expertise and presence.[33]

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[32] 20 F.3d at 52.

[33] The fallacy in the Second Circuit's test is also reflected in the fact that, in explaining the parameters of its test, the Second Circuit admonished the district court to instruct the jury to consider the amount of time Latsis was on board a vessel while the vessel was in dry dock, notwithstanding that the vessel would be "out of navigation" during its dry dock period.

The Second Circuit's requirement of a "more or less" permanent connection allows the putative worker to have something less than a permanent connection to become a Jones Act seaman, despite Wilander's requirement that the worker have a "definite and permanent connection with a vessel."[34] The use of the words "more or less" weakens the legal standard and even defeats the test, since those words allow the claimant to have a relationship with the vessel that is "less" than the requisite connection. The words "more or less" confuses the jury in their application of the test. The worker either has a "definite and permanent connection with a vessel" or he does not; if he does, he is a Jones Act seaman, but if he does not, then he is not a Jones Act seaman.

The Second Circuit's test allows the fact finder to consider either the employee's duration aboard the vessel or the nature of the employee's work aboard the vessel in order to determine whether the putative worker has the necessary "more or less substantial connection with a vessel" for Jones Act purposes. The test should require the fact finder to consider both the duration of the employee's connection with the vessel and the nature of that connection. By allowing the fact finder to consider either feature instead of both features, the Latsis test blurs the "sea-based workers/land-based workers" distinction inherent in the Jones Act and LHWCA and allows LHWCA "harbor workers" to become Jones Act "seamen" simply on the basis that the nature of their work allows them to be on board a vessel at the time of

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[34] Wilander, 498 U.S. at 355, 111 S.Ct. at 817, 112 L.Ed. 2d at 882, quoting Maryland Cas. Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938).

injury. This is of particular concern to amici curiae, whose "Pizzitolo/Gizoni" workers[35] have been found to constitute "harbor workers" and not "seamen" under the Fifth Circuit's Robison test.[36] Application of the Latsis test would leave the status of the TECO employees in doubt, notwithstanding the clear intention that they be "harbor workers" and "seamen."

The Latsis test fails to consider the requisite "employment connexity" in the context of the "employment function" being rendered the vessel. For example, some vessel maintenance functions of necessity must be done by "harbor workers" and "repairmen" while the vessel is in dry dock, while other vessel maintenance functions can be and are performed by "seamen" during the course of a sea voyage. The former maintenance function must be considered "shoreside," since while in dry dock the vessel is out of navigation, while the latter maintenance function must of necessity be considered "ship's work." The distinguishing characteristics between the two maintenance functions is that the former is performed by shoreside individuals whose work temporarily necessitates their being on a vessel, whereas the latter involves employees whose "allegiance to the ship" require them to maintain the ship on a daily routine. Amici curiae submit that the Second Circuit's Latsis test would allow both workers to be Jones Act seamen, yet only the latter worker would be considered a seaman under the dictates of Wilander.

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[35] Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), overruled, Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991). See Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993).

[36] Campo v. Electro-Coal Transfer Corp., 970 F.2d 51 (5th Cir. 1990), cert. denied, 113 S.Ct. 1261, 122 L.Ed. 2d 659 (1993).

Finally, the Latsis test does not preserve the distinction between "sea-based" workers and "land-based" workers inherent in the Jones Act and the LHWCA and recognized in Wilander, since the Second Circuit's jury charge does not instruct the jury that the claimant might fall within the scope of the LHWCA rather than the Jones Act. The claimant's status under the LHWCA is certainly relevant in the jury's determination whether or not the claimant is a Jones Act seaman. Therefore, the Latsis test is contrary to Wilander's requirements.

III. A new test for determining seaman status

Experience in many status jury trials has shown that the "sea-based workers versus land-based workers" distinction recognized by Wilander is meaningless unless the jury is advised of this distinction. Any jury instruction that is framed from the Court's test of "seaman" status must inform the jury that the alternative to "seaman" status is "employee" status under the LHWCA, so that a claimant may be a "harbor worker" under the LHWCA instead of a "seaman" under the Jones Act. Otherwise, the jury is left with the improper impression that the claimant must either be a Jones Act seaman or else the claimant is not entitled to any recovery of benefits, which is simply not true. Therefore, in order to provide all parties with their constitutional rights under the Seventh Amendment of the Constitution and to maintain the distinction between "sea-based" workers and "land-based" workers inherent in the Jones Act and in the LHWCA, this Court must not only frame a clear and comprehensive definition of the term "seaman," this Court must also frame a jury instruction which advises of a claimant's alternative status. It is, after all, the

jury — trier of fact — that applies the legal standard to the facts before them.[37]

Latsis and Robison are both too broad in light of Wilander. Wilander recognizes that the Jones Act and the LHWCA create a "sea-based workers/land-based workers" distinction, and Wilander requires that any Jones Act test preserve that distinction. Amci curiae offer a new test:

> A maritime worker is a "seaman" under the Jones Act, if the worker can establish —
>
> 1. The worker is permanently assigned to a vessel* that is in navigation or otherwise has a substantial employment connection to that vessel.
>
> 2. The work performed contributes to the function of the vessel or to the accomplishment of its mission.
>
> 3. The worker's assignment to the vessel and the worker's contribution to the vessel exposes the worker to perils peculiar to the sea.

*(or identifiable group of vessels acting together or under one control)

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[37] Wilander, 498 U.S. at 356, 111 S.Ct. at 880, 112 L.Ed. 2d at 883.

This legal test maintains the "sea-based versus land-based workers" dichotomy inherent in both the Jones Act and the LHWCA.

In maintaining this distinction, there is no reason to give one statute's "status" requirement a broader interpretation than the other. In Northeast Marine Terminal Co. v. Caputo,[38] this Court gave term "employee" as used in the LHWCA a broad and liberal interpretation in keeping with the LHWCA's purpose of extending coverage to a wide variety of maritime workers. In Wilander, this Court gave the term "seaman" as used in the Jones Act an expansive and liberal construction in keeping with the Jones Act's purpose of protecting sea-based maritime workers. Although in Wilander this Court recognized the "mutual exclusivity" of the coverage afforded by the Jones Act and the LHWCA, previously this Court has held that the Jones Act and LHWCA are to be read in pari materia with each other.[39]

Amici curiae's test recognizes that the maritime worker either falls within the scope of the Jones Act or within the scope of the LHWCA, and so amici curiae's test preserves the "sea-based workers versus land-based workers" distinction inherent in the Jones Act and the LHWCA, and at the same time, maintains the mutual exclusivity of the two statutes.[40] The "sea-

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[38] 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320 (1977).

[39] Warner v. Goltra, 293 U.S. 155, 159, 55 S.Ct. 46, 48, 79 L.Ed. 254, 258 (1934).

[40] The only exception is that of the "passenger" or "invitee" aboard a vessel, who is neither a seaman nor a harbor worker, and so is not protected under either the Jones Act or the LHWCA. See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed. 2d 550 (1959).

based versus land-based workers" distinction can be maintained only if the status requirements of the Jones Act and the LHWCA are given equal consideration, and then only if the jury is informed that the alternative to Jones Act "status" is LHWCA "status."

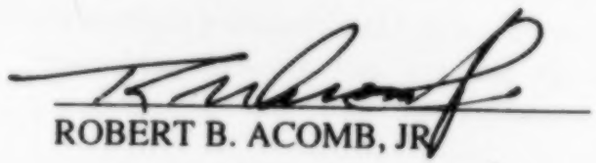
The test suggested by amici curiae will better provide the fact finder with a definition that those intended by Congress to be seamen will be found to be seamen and those intended to be harbor workers will be found to be harbor workers, in that those doing "ship's work" will be seaman and those doing "shore-based work" albeit aboard a vessel will not be found to be seamen. The test suggested by amici curiae ensures that those who really do suffer the perils peculiar to those who go to the sea will be protected by the Jones Act, while those who are exposed to a broader range of perils will be protected by the LHWCA.

CONCLUSION

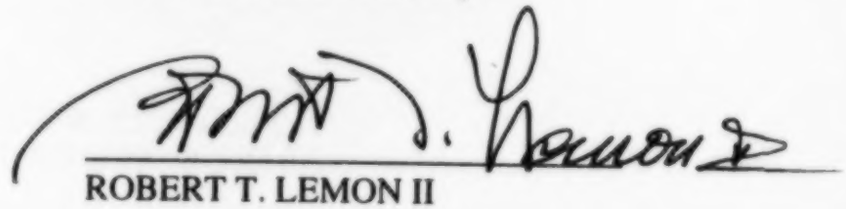
This Court should reverse the judgment of the Second Circuit Court of Appeals and remand the case with instructions to reinstate the jury verdict entered by the district court. However, at the same time, it would be extremely beneficial to all interested parties if the Court would expand further its previous opinion in McDermott International, Inc. v. Wilander, and furnish more comprehensive guidance regarding the appropriate legal test for defining the term "seaman" under the Jones Act. The present tests utilized within the federal and state court systems are totally insufficient to permit a proper and uniform determination of who is and who is not a Jones Act seaman. However, a comprehensive legal standard for determining "seaman" status under the Jones Act requires that the jury be instructed to consider the claimant's

alternative status under the LHWCA, otherwise, the distinction between "sea-based" workers and "land-based" workers inherent in the Jones Act and LHWCA becomes meaningless.

Respectfully submitted,



ROBERT B. ACOMB, JR.



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Amicus Curiae Brief have been forwarded to all counsel of record by depositing same in the United States mail, postage prepaid and properly addressed, this 30th day of November, 1994.

ROBERT B. ACOMB, JR.

No. 94-325

(6)

Supreme Court, U.S.
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IN THE
SUPREME COURT of the UNITED STATES
October Term 1994

CHANDRIS INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

- against -

ANTONIOS LATSIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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No. 94-325

IN THE
SUPREME COURT of the UNITED STATES
October Term 1994

CHANDRIS INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE THE CITY OF NEW YORK

The primary issue before the Court in this case is whether the definition of "seaman" for purposes of the Jones Act, 46 U.S.C. § 688, includes employees who are not part of the regular crew of a vessel but have some sort of connection to the work it performs. This question concerns the City of New York, which, with 576 miles of waterfront and 146 square miles of navigable water, is engaged in maritime employment in one of the world's busiest ports. The Staten Island Ferry transports 62,000 passengers a weekday on 5 ferries; the Police Department Harbor Unit operates 21 police launches; the Fire Department Marine Division operates 3 fireboats; the Department of Environmental Protection operates 11 vessels ranging from 24-foot survey vessels to a 324-foot sludge tanker; and other vessels are operated by the Department of

Parks, the Department of Sanitation and the Department of Corrections.

The City of New York also owns vessels that do not employ seamen, such as a prison barge housing 800 inmates, floating cranes and other construction platforms, 100 garbage scows, and spare backup vessels. In addition, police and fire emergency service units deploy rowboats, inflatable boats and jet-skis for shoreside water rescue. The majority of City employees assigned to the maritime agencies do not generally work aboard the City's vessels; rather, they are landbased maritime workers who assist in the overall operation of vessels.

Here, the Court is being asked to address the definition of seaman status in the context of a supervising engineer who travels occasionally on vessels in a fleet of cruise ships. Of course, the job performed by a supervising engineer on an ocean-going passenger ship is easily

distinguishable from the work performed by the City's brown-water maritime workers, whether ferry workers, harbor police or sludge tankermen. However, the test formulated by this Court for seaman status will apply to all maritime workers who seek compensation under the Jones Act.

The City is critically interested in the formulation of a test that will determine that only those maritime workers regularly assigned as members of the crew will be considered seamen for Jones Act purposes. The City of New York submits that (1) the question of whether a worker is covered by a federal law (Jones Act) is a threshold question of subject matter jurisdiction answerable as a matter of law[1]; and (2) the Court of Appeals failed to

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[1] Federal Rule of Civil Procedure 12(b) provides a procedure for resolving subject matter jurisdiction questions in a motion to dismiss. The test for Jones Act seaman status is a jurisdictional question that should be no more difficult to resolve by the court than a challenged domicile in a (continued...)

establish a predictable test here. Accordingly, the City urges this Court to reverse the decision of the Second Circuit, although perhaps on grounds other than those raised by the parties in their arguments before this Court.

Since the test for seaman status does not rely on an interpretation of legislative intent or public policy goals indicating a preference for Jones Act coverage over other compensation statutes, the test should be reliable, predictable, and outcome neutral. The City proposes a simple test for seaman status that looks to the staffing requirements of the vessel to determine who is a regular member of the crew and therefore entitled to Jones Act protection. The answer to who is a member of the crew can

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[1] (...continued)
diversity case. While issues of liability and damages must be resolved on a case by case basis, the issue of which compensation statute covers workplace injuries for maritime workers must be more predictable simply because workers performing the same job should be covered by the same law.

be found in the ship's log, which will show who is permanently assigned to the vessel.

STATEMENT OF THE CASE AND BACKGROUND

In McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991), the Court stated that seaman status evolves from a "definite or permanent" employment connection to a vessel in navigation. Id. at 355. While the nature of the connection was not fully defined, the Court held "that a necessary element of the connection is that a seaman perform the work of a vessel". Id. In the instant case, the Second Circuit Court of Appeals ruled that the test for seaman status required a "more or less permanent" connection. 20 F.3d 45. In comparison, the Fifth Circuit Court of Appeals' test for seaman status requires a permanent assignment or performance of a "substantial part of his work on the vessel." The Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). However,

whether on the basis of a "more or less permanent" test or a "substantial portion" test, both Circuits concluded that a maritime worker who spends a small percentage of his overall work-time on a vessel could be a seaman. Compare, Latsis, supra, 20 F.3d at 54 (less than 10%) and Easley v. Southern Shipbuilding, 965 F.2d 1, 5 (5th Cir. 1992) (maritime worker with 11-1/2% worktime on a vessel is not a seaman, but "percentage of a worker's time on a vessel in navigation is [not] the sole or determinative factor in the search for seaman status"); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (maritime worker performing 20-30% of his work on a vessel is not a seaman).

ARGUMENT

THE SECOND CIRCUIT ERRED IN FINDING SEAMAN STATUS WHERE A LANDBASED ENGINEER WAS NOT A REGULAR MEMBER OF THE CREW. A PREDICTABLE TEST FOR SEAMAN STATUS IS NEEDED THAT CAN BE RESOLVED BY RULE 12(b) PROCEDURE AS A JURISDICTIONAL QUESTION.

Maritime workers include all those whose employment brings them within a federal or state court's admiralty jurisdiction.[2] Maritime law distinguishes between landbased maritime workers and seamen to determine

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[2] Admiralty jurisdiction is present when an accident occurs upon navigable waters involving a maritime activity. Workman v. New York City, 179 U.S. 552 (1900); McDonald v. City of New York, 36 F.2d 714 (2d Cir. 1929). A maritime tort cause of action can be brought in federal court or in state court under the savings to suitors clause. Jurisdiction for maritime injuries occurring on land derives from various federal statutes. E.g., Jones Act; Longshore and Harbor Workers' Compensation Act, 33 U.S. C. § § 901 et seq.; Admiralty Extension Act of 1948, 46 U.S.C. § 740 (extends admiralty jurisdiction to injuries on land caused by a vessel). See, Heim v. City of New York, 442 F.Supp. 35 (E.D.N.Y. 1977)

whether the Jones Act or some other worker's compensation statute, whether federal or state, provides benefits in the event of a workplace injury.

The Jones Act itself does not define the term "seaman": that definition is found in the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 901 et seq.; Wilander, 498 U.S. at 347 ("Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute").[3]

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[3] The source of Jones Act coverage also gives rise to certain "odd but true" anomalies when applied to the City of New York. First, the Jones Act gives seamen the same rights as railroad workers under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 et seq. FELA covers only railway workers engaged in interstate commerce. Felton v. Southeastern Pennsylvania Transportation Authority, 952 F.2d 59, 66 (3d Cir. 1991). Thus a city subway worker engaged in work on intrastate railway has no rights under FELA, yet a Staten Island Ferry crew member receives a railway worker's rights through the Jones Act. Second, even though the definition of seaman is found in the LHWCA, the LHWCA by its terms does not cover states and their political subdivisions. 33 U.S.C. § 903(b). Thus, landbased maritime workers employed by the (continued...)

One factor distinguishes a landbased maritime worker from a seaman: the connection to a ship. "The key to seaman status is employment-related connection to a vessel in navigation". Wilander, supra, 498 U.S. at 355. Seamen include "[a]ll who work at sea in the service of a ship". Id. at 354. Seamen "owe allegiance to a vessel at sea." Id. at 347. Seamen work "on board" a vessel. Id. at 346.

The Jones Act status test does not require that a seaman perform "seaman's duties". "It is not the employee's particular job that is determinative, but the employee's connection to a vessel." Wilander, supra, 498 U.S. at 354. For example, the duties that seamen perform include cook, chambermaid, waiter and bartender. Id. at 345.

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[3] (...continued)
City who are not members of the crew receive worker's compensation under state law. O'Brien v. City of New York, 822 F.Supp. 943 (E.D.N.Y 1993).

However, just like regular members of the crew, landbased maritime workers can perform the work of a vessel. Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991). This is because any task performed on a vessel is in some way in furtherance of the vessel's mission, whether the work is done by a landbased maritime worker who makes repairs or unloads cargo, or a member of the crew who is regularly engaged in the vessel's transportation function. See, Bach v. Trident Steamship Co., 947 F.2d 1290 (5th Cir. 1991) (harbor pilot who navigates an ocean-going vessel into port performs the work of a vessel, yet has been found not to be a Jones Act seaman); Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991) (same); McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) (maintenance worker painting the mainmast of a museum vessel was not a seaman); Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 39 (2d Cir.

1982) (ship repairmen injured or killed while working on a ship on the high seas were landbased maritime workers); Marroquin v. American Trading Transportation Co., Inc., 711 F.Supp. 1165 (E.D.N.Y. 1988) (ship's "riding crew" cleaning the cargo tank on a vessel sailing on the high seas were harbor workers). Thus, case law supports the conclusion that a landbased worker may be called upon to perform work which a seaman might perform and not be covered by the Jones Act.

When Wilander "jettison[ed] the aid in navigation language" from the test of Jones Act seaman status, 498 U.S. at 353, the approach that labels certain tasks as "seaman's duties" fell aside as well. Wilander rejected a definition of "seamen's duties" that required seamen to "hand, reef and steer", referring to a 19th Century test of seaman status. 498 U.S. at 343. Thus, the Second Circuit erred when it relied on the fact that plaintiff, as a

supervising engineer, was doing "traditional seaman's duties." 20 F.3d at 56. An analysis of seaman status based on the task performed on vessels is simply not consistent with this Court's discussion in Wilander. Whether the plaintiff in Latsis had the past experience of a traditional seaman is irrelevant to the determination of whether he is a present member of the crew. Plaintiff's current employment status, not his job title as marine engineer, should determine what compensation statute applies. Gizoni, supra, 502 U.S. at ___, 112 S. Ct. 486, 492.

A. The Latsis "More or Less Permanent" Connection to a Vessel Test for Seaman Status is Unworkable.

We submit that the Second Circuit Court of Appeals was incorrect when it held that maritime workers who spend only 10% of their time on board can be seamen. 20 F.3d at 54. The central error in Latsis is that the court focused on the purpose of the maritime worker's presence

on the vessel at the time of injury to find seaman status, rather than determining whether a maritime worker's overall assignment to the vessel was as a member of the crew of the vessel in its regular operation.

The Second Circuit's "more or less permanent connection" test for seaman status will prove unworkable.[4] Even the terminology "more or less" is ill-suited to precise legal definition, particularly when applied to occasional seamen. While the Circuit states that the test is not a "temporal concept," it requires a connection "more than temporary or transitory". 20 F.3d at 57. The Circuit defined the employment-related contribution in terms of (a)"duration" and (b)"nature". Id. The duration prong considers the "number and frequency of similar

[4] The Second Circuit's "more or less permanent" connection test originates in Salgado v. M.J. Rudolph Corp., 514 F.2d 750 (2d Cir. 1975), where the maritime worker seeking seaman status was found to be a landbased harbor worker, not a Jones Act seaman.

contributions," while the "nature" prong may include the "amount of time and effort spent ashore preparing" the vessel. In addition, the connection must "regularly expose plaintiff to the hazards of sea."[5] Id.

Despite the stated requirement of a "permanent" connection, the Circuit Court ruled that a maritime worker

[5] The "hazards of the sea" are endured by the regular crew of a vessel, who face both the mundane and the unpredictable conditions on board a vessel. Seaman status does not depend on whether the vessel was moored in calm water or riding out a hurricane in blue water when the injury occurred. Despite the Circuit's requirement that a plaintiff be "regularly expose[d] . . . to the hazards of the sea", there is no requirement that the injury itself be caused by the hazards of the sea to be compensable under the Jones Act.

Landbased maritime workers also face dangerous conditions at work. Victory Carriers, Inc. v. Law, 404 U.S. 202, 208 n.1 (1971); Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 756 (2d Cir. 1975) ("stevedoring is one of the most dangerous occupations"). Theoretically, a compensation system could be devised that increased benefits based on the degree of workplace hazards. However, the hazards of the workplace is not a criterion used by the courts when determining which compensation statute applies.

who works less than 10% of his time aboard a vessel in navigation could be a seaman. 20 F.3d at 54. The court stated that such a broad test for seaman status is required so as not to frustrate the policy of the Jones Act. Id. at 55. Yet the court completely ignored the fact that maritime workers are covered by other compensation laws with precisely the same policy goals as the Jones Act. Nor is the Court's definition of a Jones Act seaman supported by legislative intent, identified public policy goals or based on an analysis which prefers one compensation scheme to another.[6]

The Second Circuit Court of Appeals in Latsis v. Chandris, Inc. relied on United States District Judge I. Leo Glasser's analysis in Buccellato v. City of New York, 808 F. Supp. 967 (E.D.N.Y. 1992), in which the court denied

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[6] Without policy goals to guide the choice between alternative compensation statutes, a predictable test for coverage will at least enable an employer to accurately gauge its liability for workplace injuries.

the City's summary judgment motion on the issue of seaman status in ten "related" cases arising from unrelated workplace injuries brought by workers performing the same job. 20 F.3d at 53; 808 F.Supp. at 970 n.1.

The City argued in Buccellato that sanitation workers assigned to the barge unloading operation at Fresh Kills Landfill ("the digger gang") were not seamen because they never traveled aboard the barges while transporting garbage across New York Harbor. 808 F.Supp. at 971. Members of the digger gang go on barges to clean, handle lines and to perform other duties while the barges are tied along the dock. Id. at 969-70. Digger gang workers are positioned on the light (unloaded) and heavy (loaded) barges when the vessels are shifted by land-powered lines and cables along the dock during the unloading operation. Id. at 969-70. At all times during the shifting operation the barges remain connected to land by lines.

In formulating its test for seaman status, the Second Circuit approved of the analysis of the test in Buccellato that left to the jury the question of whether a worker at the water's edge, who assists vessel unloading operations but never goes to sea on a ship, is a seaman rather than a landbased maritime worker. The related cases continue in discovery with separate trials expected next year.

The City contends that Buccellato was wrongly decided.[7] Under the current test, in Buccellato, ten separate

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[7] The City's contentions on seaman status have been raised in state as well as in the federal courts, but have not yet been reviewed by either the Circuit Court of Appeals or the New York Court of Appeals. Fallon v. City of New York, 1994 WL 75164 (S.D.N.Y. 3/8/94) (n.o.r.) (ferry deckhand assigned to the terminal not a seaman); O'Brien v. City of New York, 182 A.D.2d 744, 582 N.Y.S.2d 763 (2d Dept. 1992) (ferry terminal supervisor not a seaman even though part of his duties took him aboard the ferries); see also, O'Brien v. City of New York, 822 F.Supp. 943 (E.D.N.Y. 1993) (second attempt to seek damages under LHWCA barred on res judicata and other grounds). The City's summary judgment motion challenging the seaman status of a dock builder was denied in Tramutola v. City of New York, CV-91-3570(CBA) (E.D.N.Y.) and decision (continued...)

juries will decide whether each worker is covered under the Jones Act; it is likely that some digger gang workers will obtain jury verdicts finding seaman status and others will not.

In another case brought by a City sanitation worker injured while working in the digger gang, the issue of seaman status was tried to verdict. The jury's verdict that plaintiff was not a seaman was sustained in Leotis v. City of New York, 818 F. Supp. 63 (S.D.N.Y. 1993). While this jury verdict has no collateral effect on the other digger gang cases, it would be inconsistent and unfair if one worker was granted coverage under a worker's compensation statute while a co-worker doing the same job was denied those same statutory rights because a jury viewed the situation differently.

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[7] (...continued)
following a bench trial of the seaman status issue is pending.

The fact that the Second Circuit relied on Buccellato in its analysis in the instant case fairly predicts that the Circuit's test, if affirmed, will continue the practice of routinely leaving to a jury the resolution of seaman status of maritime workers only marginally connected to a vessel. There will be no assurance that maritime workers performing the same job will receive the same coverage under the statute.

B. The Test for Seaman Status Proposed by the City of New York as Amicus Curiae to Resolve the Issues Presented by the Second Circuit's Decision in This Case.

It is the City's position that the term "seaman" should be simply defined as a regular member of the crew assigned to a vessel in navigation. Application of this definition depends, in turn, on (1) identification of what is a "vessel" for Jones Act purposes, and then (2)

identification of those workers which constitute its regular crew.

To do the ship's work, and thereby be a member of the crew, a maritime worker must be aboard the vessel while it is engaged in transportation across navigable waters. A maritime worker must "voyage" on a vessel to be a seaman. The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916) ("[E]very one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when [the ship] is upon a voyage"). The City submits that when the ship leaves the dock to start its voyage, the seaman is a permanently assigned member of the regular crew.

1. What is a Jones Act Vessel?

A "vessel" for purposes of the Jones Act is a commercial floating structure whose primary purpose is the transportation of passengers, material or cargo across

navigable waters. Hatch v. Durocher Dock and Dredge Inc. 33 F.3d 545 (6th Cir. 1994). The transportation function of the vessel distinguishes the Jones Act vessel from other vessels. Vessels without an assigned crew, even if engaged in transportation, logically are not Jones Act vessels. Thus, Jones Act vessels do not include unmanned barges, such as garbage scows, because other than the tug crews that move these barges across navigable waters, no maritime worker is assigned as a member of the crew when it is engaged in transportation.

Also excluded are vessels such as construction platforms that are capable of navigation, but whose primary purpose is not navigation. Hatch, id. (derrick barge); DiGiovanni v. Traylor Bros. Inc., 959 F. 2d 1119, 1123 (1st Cir. 1992) (same); Tonnesen v. Yonkers Contracting Co., 847 F.Supp. 12 (E.D.N.Y. 1994) (same); McCarthy

v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) (museum ship).

Similarly, vessels undergoing substantial repair or out of service are not Jones Act vessels. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Kathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir 1992); McClendon v. OMI Offshore Marine Service, 807 F.Supp. 1266 (E.D. Texas 1992) (purported seaman injured in the galley of a tow-boat in drydock while cooking a potato laced with mercury during an alchemy experiment).

2. Who is a Regular Member of the Vessel's Crew?

If the floating structure qualifies as a Jones Act vessel, the court should then determine whether the plaintiff is a regularly assigned member of the crew of the vessel. Only a member of the regular crew can establish the required connection to a vessel in navigation to be a Jones

Act seaman.[8] The first step in identifying the members of the regular crew is a look at the ship's roster or operating logs. See, Roth v. U.S.S. Great Lakes Fleet, Inc., 25 F.3d 707 (8th Cir. 1994) ("list of the crews . . . adds to the conclusion that he was not a member - as his name does not appear on [the] list"). J.S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910) (bartender's name in "ship's time-book satisfied [the court] that he was in fact" employed as a seaman). Contemporaneous time records are a predictable indication of whether the employee has a permanent assignment on the vessel.

Vessels regularly engaged in commerce have regular crews. For example, a New York City 52-foot police patrol launch has a crew consisting of pilot, navigator and engineer; the crew of a Staten Island Ferry consists of a

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[8] Seaman status only determines which law applies; without an indication of legislative preference for coverage under one compensation statute over another, the test for coverage under the Jones Act should be outcome-neutral.

captain, an assistant captain, a chief engineer, a mate, deckhands and oilers. The people regularly assigned to work on these vessels are the crew of the vessel. Workers who occasionally go out on these vessels do not lose their landbased employment status.

The plaintiff in Latsis was a landbased supervisor and not a regularly assigned engineer. The Second Circuit had no difficulty determining that the Chandris vessels "depending on size, carried between 12 and 14 licensed engineers on board". The operation of the vessel did not require plaintiff's presence on board. 20 F.3d at 48. Clearly his employer did not permanently assign him to the vessel for the future. See, Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1252 (3d Cir. 1994).

The definition of "member of the crew" should be limited to the personnel assigned to the vessel when it performs its regular missions. The inquiry should shift from

defining "seaman" in terms of a plaintiff's work experience to identifying the regular crew of the Jones Act vessel. To insure predictability, the test should exclude substitute crew members and occasional voyagers. When an employee divides his work between landbased and vessel-based duties, the predominant nature of his job should control whether he is considered a seaman or a harbor worker.[9] The maritime employee should be covered as a seaman or a landbased worker, not both. A look at the ship's log will generally end the inquiry.

Finally, the situs of the activity engaged in at the time of the accident has no relevance to the status test. A worker entitled to coverage under the Jones Act is covered for any injury while he is in the service of the vessel. His

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[9] When there are no disputed material facts, the question of seaman status can be resolved on a Fed. R. Civ. P. 12(b) motion without a hearing. Compare, Buccellato, 808 F.Supp. at 970 (although material facts are not in dispute, question of seaman status left for jury determination).

employment status controls what statute applies, whatever his various duties on the vessel and ashore. The fact that an accident happened on board a ship, on the gangway, or on the dock has no effect on the outcome of the seaman status test. Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959). Thus, dicta in Latsis suggesting as much must be abandoned. 20 F.3d at 56 ("[W]e express no opinion as to whether Latsis would have been covered had he been injured while the vessel was in drydock"). See also, DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119, 1123 (1st Cir. 1992) (workers assigned to floating crane barge "are to be considered seamen only when it is actual navigation or transit").

Employees of the City of New York regularly assigned as members of the crew have long been held to be covered by the Jones Act. See, Jacob v. New York City, 315 U.S. 752 (1942) (full-time maritime oiler aboard a

Staten Island ferry); Oxley v. City of New York, 923 F.2d 22 (2d Cir. 1991) (full-time pilot on police launch); Bailey v. City of New York, 55 F. Supp. 699 (E.D.N.Y. 1944), affd, 153 F.2d 427 (2d Cir. 1946) (ferry engineer assigned to engine room); Pariser v. City of New York, 146 F.2d 431 (2d Cir. 1945) (dredge worker). Temporary or substitute crew members and dockside workers who prepare the vessel for voyage are not seamen. Fallon v. City of New York, (see n.7, infra); Wolbert v. City of New York, 314 F.Supp. 528 (E.D.N.Y. 1970) (deckhand assigned to ferry terminal injured while assisting tie-up of a ferry was not a seaman). Also excluded from Jones Act coverage are maritime workers who board to inspect vessels. O'Brien v. City of New York, supra, 182 A.D.2d at 744.

* * *

Landbased maritime workers who go onto vessels perform virtually any function on the vessel that can be

performed by a member of the crew. A seaman is distinguished from a landbased maritime worker by being a regular member of the crew. A simple test that requires, for purposes of the Jones Act, that the vessel be primarily engaged in commercial navigation and that a seaman must be a regular assigned member of the crew, as defined by the ship's log, is preferable to the unfathomable confusion generated by hundreds of court decisions that try to answer the simple question: "what is a seaman?"[10]

---

[10] A recent Westlaw search in the maritime cases database (since 1945) of the terms "Jones Act" and "seaman status" lists 454 cases.

CONCLUSION

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

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No. 94-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHANDRIS, INC., CHANDRIS, S.A. and
FOURTH TRANSOCEANIC SHIPPING CO., LTD.,
Petitioners,

vs.

ANTONIOS LATSIS,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 50,000 members primarily represent injured persons, including those injured in maritime activities. All parties to this action have consented in writing to the submission of this brief, and the appropriate letters of consent have been filed with this Court.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), this Court specifically addressed the issue of seaman's status under the Jones Act. The Court held that a maritime worker need not be engaged in the actual navigation of a vessel to be a seaman for purposes of the Jones Act. The exact contours of the maritime worker's employment-related connexity to a vessel or fleet of vessels was not before the Court in *Wilander*. As the Court pointed out, "We are not called upon here to define [employment-related] connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel." 498 U.S. at 355. This aspect of Jones Act status has been treated differently and often inconsistently by the Courts of Appeals. As one commentator states, concerning the Fifth Circuit's test for seaman's status in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (en banc), it "has proven to be clumsy, imprecise, and subject to considerable judicial gymnastics. Jack L. Allbritton, *Seaman Status in* Wilander's *Wake*," 68 Tul. L. Rev. 373, 388 n.110 (1994).

The semantic nature of such judicial gymnastics is readily manifest in the briefs that have been filed with the Court in this case. In the amicus curiae brief filed on behalf of TECO Transport & Trade Corporation and other industries, for example, the author takes the Second Circuit's test for seaman's status to task because it is based, in part, on the precept that seaman's status requires a "more or less permanent connection with a vessel." At the same time, the author advocates the Fifth Circuit's test, which, in part, requires that the would-be seaman perform a substantial part of his work on the vessel. While neither test requires permanent assignment to a vessel, the degree to which a "more or less permanent" connection to a vessel differs from a "substantial" connection to a vessel has led to different tests for seaman's status being promulgated by the Courts of Appeals. As a result, whether a maritime worker is deemed a seaman may well depend upon the Circuit in which his action

is filed. Justice, as a consequence, results not from evenhandedness but from geographic fortuity. Because the Second Circuit in *Latsis* provides guidance to resolve this aspect of the seaman's status question, by directing lower courts to assess the duration as well as the nature of the maritime worker's employment-related connection to a vessel, the *Latsis* court's test resolves much of the existing confusion attending the issue of seaman's status.

Accordingly, the Association of Trial Lawyers of America, as amicus curiae, supports the position of respondent in this lawsuit and urges that the decision rendered by the Court of Appeals for the Second Circuit be affirmed.[1]

SUMMARY OF THE ARGUMENT

At issue before the Court is the efficacy of its directive in *Wilander*--that a Jones Act seaman is a maritime worker who owes his "allegiance to a vessel and not *solely* to a land-based employer." 498 U.S. at 347 (emphasis added). In *Wilander*, the Court acknowledged that any inquiry into seaman's status is of necessity "fact specific" and requires attention to "the activity in which [the maritime worker] was engaged at the time of the injury" as well as "the employee's precise relationship" to the vessel. 498 U.S. at 356. No question exists but that Latsis, the respondent, was a member of the crew of the S.S. GALILEO at the time of his injury and was deemed to be such by his employer.[2]

---

[1] ATLA adopts the Statement of the Case and Legal Argument set forth in Respondent's brief.

[2] In fact, the district court judge instructed the jury, via the parties' stipulation, that Latsis's work "was a contribution to the functioning of the vessel and assisted in the accomplishment of its various missions." J.A. 211.

In *Wilander*, the Court held that a worker who was assigned to a vessel for the duration of that vessel's voyage and whose work assignments contributed to the vessel's mission satisfied the requirements for status under the Jones Act. In *Latsis*, a member of a vessel's crew was injured by a recognized peril of the sea while contributing to the function of the vessel during its voyage. In ruling, however, that this same vessel was out of navigation as a matter of law during a six-month period when it was in drydock in Germany, the trial court erred, for it required the jury not only to ignore the nature of Latsis's service to the vessel during the entire period to which he was assigned to it, but the district court also instructed the jury to treat that service as unrelated to Latsis's status as a member of the S.S. GALILEO's crew. Thus, the jury was instructed to ignore a substantial portion of Latsis's employment-related work aboard and on behalf of the vessel.

In holding this instruction to be legal error, the Court of Appeals for the Second Circuit properly recognized that to determine seaman's status under the Jones Act, a court must assess the individual's employment-related connection to the vessel. To do so, the Second Circuit held that the factfinder must accept not only that the seaman contributed to the function of or helped to accomplish the mission of the vessel, but that (1) the worker's contribution was "limited to a single vessel or group of vessels," and that his contribution was "substantial in terms of its (a) duration or (b) nature," and, finally, that in the course of his employment, he was regularly exposed to the hazards of the sea. *Latsis v. Chandris, Inc.*, 20 F.3d 45, 57 (2nd Cir. 1994). This test comports with the Court's directives concerning seaman's status in *Wilander* and in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

The test for seaman's status, as articulated by the Second Circuit in *Latsis*, not only furnishes the jurisprudential means by which lower courts can distinguish between land-based

workers and seamen, but it incorporates and integrates the principles set forth in the Court's *Wilander* decision by directing those courts to assess not only the perils to which a maritime worker is exposed but the duration or nature of the seaman's substantive contribution to the vessel and its mission. Accordingly, the Second Circuit provides a workable method by which the lower courts will be able to distinguish land-based workers, such as longshoremen and harborworkers, from those maritime workers intended to fall within the ambit of the Jones Act's coverage.

ARGUMENT

THE SECOND CIRCUIT'S TEST FOR SEAMAN'S STATUS IN *LATSIS* COMPORTS WITH *WILANDER'S* MANDATE THAT A SEAMAN HAVE A SUBSTANTIAL EMPLOYMENT-RELATED CONNECTION TO A VESSEL OR VESSELS.

The term "seaman" represents a "maritime term of art" that has a long history. *McDermott, Inc. v. Wilander*, 498 U.S. at 342. The initial task before the Court in *Wilander* -- "to determine who was a seaman under the general maritime law when Congress passed the Jones Act -- is again before the Court. *Id.* As the Court acknowledged in *Wilander*, however, ". . . admiralty courts throughout the world had long recognized that seamen's benefits were properly extended to all those who worked on board vessels in furtherance of the myriad purposes for which ships set to sea . . .." *Id.* at 344. No question exists but that Latsis went to sea on the S.S. GALILEO, that he was acknowledged by his employer to be a member of its crew, and that his assignment to that vessel was for the duration of its voyage. Under such circumstances, his employment is readily distinguishable from that of a longshoreman, or other land-based worker, who

CONCLUSION

The decision by the Second Circuit should be affirmed, with this Court's directive that seaman's status be defined in accordance with the legal guidelines articulated by the Court of Appeals for the Second Circuit.

Respectfully submitted,

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BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C. § 688?

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BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 567,000 working men and women. Many of those men and women work upon the navigable waters of the United States. They work as deep sea divers, diver tenders, piledrivers, carpenters, riggers, welders, and

marine platform builders. They work on rivers, in harbors, and upon or beneath the high seas. They construct piers, wharves, bridges, oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. They perform those tasks from derrick barges, dredges, tugs and other special purpose construction vessels owned or operated by their employers. Their work "*necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land."[1] This Court has confirmed their maritime status under both the Longshore and Harbor Workers Compensation Act ("LHWCA")[2] and the Jones Act.[3] We respectfully submit that this status gives them an abiding interest in the question for review.

SUMMARY OF ARGUMENT

This case comes to Court in the wake of *McDermott International, Inc. v. Wilander*[4], and *Southwest Marine, Inc. v. Gizoni*[5] and steers us back towards the rocks and shoals of Jones Act coverage. We're standing into ill-charted

[1] *Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir. 1984) [original emphasis].

[2] *E.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 293 (1983) [piledriver held Longshore "employee"].

[3] *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) [piledriver held Jones Act "seaman"].

[4] *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).

[5] *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486 (1991).

waters. The Jones Act, of course, protects "[a]ny *seaman* who shall suffer personal injury in the course of his employment"[6], but nowhere defines that key term.[7] As a consequence, the statute has drifted on a sea of conflicting interpretations for more than seventy-four years.[8] The *Wilander* decision escorted us past one of those conflicts when it "jettisoned" the aid to navigation requirement, and ruled that seamen need not serve the transportation function of their vessel, provided they contribute to her overall mission by doing "ship's work."[9] What is more, *dictum* from that decision set a course around the present conflict when it confirmed that: "All those who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as

[6] According to the Jones Act:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply[.]" 46 U.S.C. § 688(a).

[7] Curiously enough, though Congress uses the term "seaman" throughout the Shipping Code, the only statutory definition appears in 46 U.S.C. § 10101(3). According to that definition, "'seaman' means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed *in any capacity* on board a vessel."

[8] As one lower court Jones Act decision noted, quoting Diderot, " 'We have made a labyrinth and got lost in it.'" *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984).

[9] 111 S. Ct. at 817.

decisional, is directed."[10] That *dictum* highlighted the distinction between "land-based and sea-based employment" that underlies the mutual exclusivity of the Jones Act and the LHWCA.[11]

While the workers' compensation remedy set up by the LHWCA was intended for those who toil along the waterfront, on or near the shore, the hearty tort remedy contained in the Jones Act was designed to offset " 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' "[12] If we are to honor that critical distinction, we should concede that employees who are injured aboard a vessel, during a voyage, while performing ship's work and enduring ship's perils, are then and there Jones Act seamen whether or not they have spent the rest of their careers afloat.

In short, the UBCJA respectfully urges the Court to affirm those Jones Act cases from the Second, Third, Sixth and Ninth Circuits which hold that "a plaintiff's status as a seaman is determined at the time of his injury."[13] Those holdings jibe perfectly with *Wilander's* decision to adopt

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[10] 111 S. Ct. at 817.

[11] *Id.*

[12] *Wilander, supra*, 111 S. Ct. at 817, *quoting Seas Shipping v. Sieracki*, 328 U.S. 83, 104 (1946) [Stone, C.J. dissenting].

[13] *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 739 (6th Cir. 1986); *see also, Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.2d 1247, 1251 (3d Cir. 1994); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975); *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 525 (9th Cir. 1989).

that portion of the *Robison*[14] test which requires a crew member to " 'contribut[e] to the function of the vessel or to the accomplishment of its mission. . . . ' "[15] As even jurists from the Fifth Circuit agree, "An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the workers' status during any such employment."[16] It therefore seems difficult to square the original holding in *Robison* with the Fifth Circuit's more recent view that, "The issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation taken as a whole."[17] Whether or not this notion should be employed offensively, to expand remedial Jones Act coverage and bestow seaman's status upon ambiguous, amphibious maritime workers, it is both harsh and incongruous to apply it defensively to curtail the statute's protection and deny a seafaring plaintiff seaman standing.

The idea that a plaintiff's Jones Act status should be "determined 'in the context of his entire employment' "[18] has impelled the Fourth and Fifth Circuits to banish ship's pilots[19] and deep sea divers[20] from the statute's

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[14] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[15] *Wilander, supra*, 111 S. Ct. at 817.

[16] *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1077 (5th Cir. 1986) [Rubin, J., dissenting].

[17] *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980).

[18] *Barrett, supra*, 781 F.2d at 1075.

[19] *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 328 (5th Cir. 1991) [Brown, J., dissenting] *vacated*, ___ U.S. ___, 114

embrace. Few workers are more intimately or continuously exposed to the perils of the sea than a ship's pilot, and none more so than a deep sea diver.[21] Deep sea divers have thus enjoyed the rights and duties of seamen since at least 1859.[22] Moreover, as this Court specifically

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L.Ed.2d 706 (1991) *reinstated on reconsideration*, 947 F.2d 129 (5th Cir. 1991), *cert. den.*, ___ U.S. ___, 118 L.Ed.2d 592 (1992); *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. den.*, ___ U.S. ___, 117 L.Ed.2d. 493 (1992); *see also, Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207 (3d. Cir. 1993). *Contra see, Ringering v. Compania Maritima De-La-Mancha*, 670 F. Supp. 301 (D. Or. 1987), *affd. mem.*, 848 F.2d 1243 (9th Cir. 1988); *Clark v. Solomon Nav. Co., Ltd.*, 631 F. Supp. 1273 (S.D.N.Y. 1986).

[20] *Ashley v. Epic Divers, Inc.*, 818 F. Supp. 172 (E.D. La. 1991), *aff'd without opinion*, 976 F.2d 730 (5th Cir. 1992).

[21] *Wallace v. Oceaneering International, supra*, 727 F.2d at 436; *Webster v. Seahorse Fleet, Inc.*, 637 F. Supp. 151, (W.D.La. 1986); Robertson, "The Law of Seaman Status Clarified," 23 J. of Mar.L. & Com. 1, 15 (Jan. 1992).

[22] *See, e.g., The Highlander*, 12 Fed.Cas. 136 (D. 1859) [salvage diver held seaman]; *The Murphy Tugs*, 28 F. 429 (E.D. Mich., 1886) [salvage diver held seaman]; *Pickle v. International Oilfield*, 791 F.2d 1237 (5th Cir. 1986) [offshore oil diver held seaman]; *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984) [offshore oil diver held seaman]; *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372 (5th Cir. 1981) [salvage and construction diver held seaman]; *Taylor v. Packer Diving & Salvage Co.*, 342 F. Supp. 365 (D.C.La. 1971), *aff'd*, 457 F.2d 512 (5th Cir. 1972) [offshore oil diver held seaman]; *Webster v. Seahorse Fleet, Inc.*, 637 F. Supp. 151 (W.D.La. 1986) [offshore oil diver held seaman]; *Etu v. Fairleigh Dickinson Univ. of the West Indies*, 635 F. Supp. 290 (D.Vir.Is. 1986) [scientific support diver]; *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (D.C.La. 1965), *aff'd*, 376 F.2d 852 (5th Cir. 1967) [offshore oil diver held seaman]; *Brown & Root v. DeSautell* (Tex.Civ. App. 1977) 554 S.W.2d 764 [offshore oil diver held seaman]; *DeGaetano v. Merritt & Chapman Derrick & Wrecking Co.* (App. Div. 1927) 219 N.Y.S.

recognized in *Wilander*, ship's pilots have been treated as seamen since the earliest days of the Republic.[23] In short, Jones Act law has taken some surprising turns of late. The instant case gives this Court an opportunity to set things straight.

By affirming the decision below, and upholding seaman's status for those whose shipboard assignments at the time of the injury expose them to the perils of the sea, this Court can bring the Jones Act back on course, save the statute from harsh and incongruous interpretations, and ballast the decisions more deeply in the "land-based/ sea-based" distinction upon which the whole remedial

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242 [salvage diver held seaman]; *Kjar v. American Divers, Inc.*, 1994 A.M.C. 522 (D.C.Ha. 1991) [scuba diver held seaman]; *Hamilton v. County of Los Angeles* (1982) 131 C.A.3d 982, 182 C.R. 868 [scuba diver held seaman]; *De Court v. Beckman Instruments, Inc.* (1973) 32 C.A.2d 628 [test diver held seaman]; *Howard v. Global Marine, Inc.* (1972) 28 C.A.3d 809 [ship survey diver held seaman]; *Smith v. Union Oil Co.* (1966) 241 C.A.2d 338 [offshore oil diver held seaman]; *see also, Kopczynski v. The JACQUELINE*, 742 F.2d 555 (9th Cir. 1984) [diver tender held seaman].

[23] As *Wilander* summed up:

> "A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties as assigned them. *So a pilot*, a surgeon, a ship carpenter, and a boatswain, are deemed seamen, entitled to sue in admiralty." *Id.*, 111 S. Ct. at 811 *quoting U.S. v. Thompson*, 28 F.Cas. 102 (No. 16,492) (CCD Mass. 1832) [emphasis added]. *See also, Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 316 (1852)

Indeed, ship's pilots have been treated as seamen since the twelfth century and the Code of Oleron. *See e.g.*, Bederman, "Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts," 64 Tulane L.Rev. 1033, 1041 (1990); *Benedict on Admiralty* (7th ed. 1989), Laws of Oleron, § 27, pp. 2-6.

scheme ultimately floats. That is why the UBCJA has respectfully filed this brief.

We believe that petitioners and their *amici* are misreading *Wilander*. When it comes to describing the necessary "employment-related connection to a vessel," we respectfully submit that the Second Circuit's requirement that a plaintiff's assignment be "substantial in terms of its (a) duration *or* (b) nature," and that it "expose the plaintiff to the hazards of the sea,"[24] captures well an important requirement of seaman status.

ARGUMENT

I.

THE INQUIRY INTO SEAMEN STATUS IS FACT-SPECIFIC AND TURNS ON THE NATURE OF THE VESSEL AND THE PLAINTIFF'S PRECISE RELATIONSHIP TO IT.

We begin our analysis of the question for review by remembering that, in most cases, it's ultimate application will be a matter for the jury. Petitioner's amicus, the City of New York, urges this Court to adopt "a predictable test for seaman status" that can be resolved by "Rule 12(b) procedure as a [threshold] jurisdictional question."[25] But as *Wilander* reminds us, the issue is "better characterized

[24] *Latsis v. Chandris, Inc. (Opinion Below)*, 20 F.3d 45, 57 (2d. Cir. 1994) [emphasis added].

[25] *See* Amicus Curiae Brief of the City of New York in Support of Petitioners ("Brief of the City of New York"), p. 8.

as a mixed question of law and fact."[26] Whatever petitioner and its *amici* might hope, "The inquiry into seaman status is of necessity fact-specific; it will depend on the nature of the vessel and the employee's precise relation to it."[27] The present inquiry, of course, concerns the latter of those two factors – the employee's precise relationship to the vessel. The City of New York has nonetheless briefed us on the definition of a "vessel in navigation."[28] Since this Court's "power to decide is not limited by the precise terms of the question presented"[29], those desultory arguments[30] merit a short reply.

[26] *Wilander, supra*, 111 S. Ct. at 818.

[27] *Id.*

[28] Brief of the City of New York, pp. 21-23.

[29] *Procunier v. Navarette*, 434 U.S. 535, 559 n. 6 (1978).

[30] The UBCJA, of course, recognizes that this Court's rules are very specific, and "do not normally address any issues other than those fairly comprised within the questions presented by the petition for *certiorari* and any cross petitions." *Lake Country Estates, Inc. v. Tahoe Reg. Plan.*, 440 U.S. 391, 398 (1979). Thus, "the brief may not raise additional questions or change the substance of the questions already presented in those documents." United States Supreme Court Rule 24.1(a).

II.

THE TERM "VESSEL IN NAVIGATION" SHOULD BE INTERPRETED BROADLY, IN KEEPING WITH THE JONES ACT'S REMEDIAL PURPOSE AND LIBERAL HISTORY, AND SHOULD NOT BE CONSTRAINED BY THE PROLIX "FLOATING WORK PLATFORM DOCTRINE" OR ANY OF ITS OFFSPRING.

As used in the Jones Act, the term "vessel" has traditionally been construed very liberally.[31] According to the statutory definition, it "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[32] As this Court has specifically ruled, that definition reaches anchored special purpose vessels, such as derrick barges, dredges and paint boats, that were neither underway at the time of the accident, nor "in transit" at any point during the plaintiff's assignment.[33]

Beginning in 1984, with the Fifth Circuit's decision in *Bernard v. Binnings Const. Co.*,[34] the Gulf Coast courts have carved out a confusing and controversial exception to that broad rule known as the "floating work platform doctrine."[35] Wielding what one of the field's leading

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[31] *See e.g., Kathriner v. Unisea, Inc.*, 975 F.2d 657, 662 (9th Cir. 1992) [summarizing cases].

[32] 33 U.S.C. § 3.

[33] *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 372 (1957) [anchored dredge]; *Wilander, supra* [anchored paint boat]; *Gizoni, supra* [anchored shipyard scow].

[34] 741 F.2d 824 (5th Cir. 1984).

[35] *See also, Ducote v. V. Keeler & Co. Inc.*, 953 F.2d 1000 (5th Cir. 1992); *Ellender v. Kiva Const. & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990); *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 43

commentators has termed a "prolix" and "extremely flabby" test,[36] that doctrine uses three "non-requisite criteria" and nine free-floating "factors"[37] to distinguish between "actual" vessels and mere "floating work platforms."[38] Just how the Fifth and Eleventh Circuits selected these random determinants from the countless characteristics that ingenuity, technology, poetry, and history have crafted into the concept of a vessel was never explained, but Gulf Coast courts typically use them, like an auger, to scuttle Jones Act claims summarily under Rule 56. Those summary judgments have left a long slick of chaotic results,[39]

(5th Cir. 1989); *but see Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990); *Brunet v. Boh Brothers Construction Co.*, 715 F.2d 196, 198-199 (5th Cir. 1983).

[36] *See* Robertson, "The Law of Seaman Status Clarified," 23 J. of Mar. L & Comm. 1, 14 (Jan. 1992).

[37] The three criteria inquire whether the structure at issue was: (a) constructed and used primarily as a work platform rather than for transporting people or things; (b) moored or otherwise secured at the time of the accident; and (c) capable of anything other than a "merely incidental" transportation function. The nine free floating factors ask whether the structure sports: (1) navigational aids; (2) a raked bow; (3) lifeboats and other life-saving equip ment; (4) bilge pumps; (5) crew quarters; (6) Coast Guard registration; (7) the ability to float; (8) the ability to move; and (9) a recent history of movement. *See Bernard, supra*, 741 at 831-832.

[38] *Id.*, 741 F.2d at 831.

[39] *Compare e.g., Ellender v. Kiva Construction Co., supra* [upholding summary judgment denying seaman status to piledriver assigned to crane barge anchored on Chandeleur Sound] *with Sharp v. Johnson Brothers Corp., supra* [holding that piledriver assigned to a very similar crane barge anchored on Lake Pontchartrain could take his claim to the jury].

inter-coastal conflicts,[40] and critical comments in their wake.[41] We respectfully urge this Court to consider those cases here.

We also urge the Court to consider the First Circuit's decision in *DiGiovanni v. Traylor Bros., Inc.*[42] Taking its inspiration from the "floating work platform doctrine," that case fished the "aid to navigation requirement" from among the flotsam to which the *Wilander* decision had "jettisoned" it, and ruled that workers assigned to dredges and crane barges are seamen only when they are injured while their vessel is "in transit."[43] According to *DiGiovanni*, and its progeny, as soon as a dredge or a barge (or any other special purpose vessel whose primary mission is not the transportation of people or goods) casts off her tug, drops her anchors and sets about her special mission, the "voyage ends," and the workers upon her decks turn, Cinderella-like, into LHWCA beneficiaries.[44]

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[40] In contrast to the Fifth and Eleventh Circuit's doctrinal approach, the Ninth Circuit has ruled that "[t]here is no formula by which to determine whether a structure is a vessel." *Kathriner v. Unisea, Inc., supra*, 975 F.2d at 662.

[41] Allbritton, "Seaman Status in *Wilander's* Wake," 68 Tulane L.Rev. 363 (1994); Robertson, *supra;* Arsenault, "Special Purpose Vessels Under Attack," 5 Maritime Law Rptr 24 (Spring, 1993).

[42] 959 F.2d 1119, 1123 (1st Cir. 1992), *cert. den.*, 113 S. Ct. 87 (1992).

[43] *See also, Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 547 (6th Cir. 1994).

[44] *DiGiovanni, supra*, 959 F.2d at 1121.

Needless to say, this magical transformation was not visited upon the Act without a stinging dissent from the First Circuit's Senior Judge.[45]

Whether or not the question on appeal focuses squarely on these collateral "vessel" issues, the UBCJA respectfully requests the Supreme Court to examine *Bernard* and *DiGiovanni* in order to clarify the law. Without belaboring the point, those cases seem to be at odds not only with *Senko, Wilander*, and *Gizoni*, but with the whole history and purpose of the Jones Act, and indeed with the Fifth Circuit's own proud legacy since *Robison*. It was the Fifth Circuit, after all, that first "expanded the coverage of the Jones Act to include almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable water."[46] Its decisions have since undergone a philosophical sea change. We respectfully urge the Court to take this opportunity to determine whether that chilly new climate is truly consistent with the sunny traditions of the Jones Act. That statute, after all, is a remedial legislation that must be liberally construed to extend rather than restrict its ambit.[47] We respectfully submit that the *Bernard* and *DiGiovanni* cases have lost sight of that well settled rule. The decision below did not.

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[45] *Id.*, 959 F.2d at 1124 [Toreulla, J., and Bownes, J., dissenting].

[46] *Robison, supra*, 266 F.2d at 771.

[47] *See The Arizona v. Anelech*, 298 U.S. 110, 121-122 (1936); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375 (1932); *Warner v. Goltra*, 293 U.S. 155, 157 (1934).

III.

THE "PERMANENT" OR "SUBSTANTIAL CONNECTION" REQUIREMENT MUST BE RETOOLED IN THE WAKE OF *WILANDER* TO PROTECT ANYONE INJURED IN THE COURSE OF A VOYAGE.

As more and more authorities are taking care to point out, the old "permanent assignment" factor has been retooled by *Wilander* to comprise an "employment-related connection to a vessel in navigation."[48] Even before that decision, it had long been settled that the word " 'permanent' has never been assigned a literal interpretation under the Jones Act, and should not be given a 'wooden application,' but rather, is to be used as an analytical starting point instead of a self executing formula."[49] This seems truer still in the wake of *Wilander*.[50]

Though many lower courts remain mired in their own pre-*Wilander* interpretations,[51] a growing chorus of

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[48] *Wilander, supra*, 111 S. Ct. at 817.

[49] *Guidry v. Continental Oil Co.*, 640 F.2d 529, 523 (5th Cir. 1981).

[50] *See e.g., Bach, supra*, 947 F.2d at 1291-1293 [Brown, J., dissenting].

[51] This tendency is by no means restricted to the Fifth Circuit. In *McKinley v. Allalaskan Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992), for example, the Ninth Circuit set out its pre-*Wilander* "three part test for determining 'seaman' status under the Jones Act" as follows:

> "(1) the vessel on which the claimant was employed must be in navigation;
>
> (2) the claimant must have a more or less permanent connection with the vessel; and,

authorities has come to realize that what we once called "the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the workers' duties as they relate to the ship and the ship's mission at the time of the injury."[52] As the decision below put it, "The more or less permanent connection element of [the test for seaman status] is not merely a temporal concept."[53] Might it not, then, be time for this Court to jettison the confusing "permanency" requirement just as it jettisoned the aid to navigation requirement in *Wilander*?

1. Where, as Here, the Plaintiff Was Injured aboard a Vessel during a Voyage, Seaman Status Need Not Be Determined within the Context of His or Her Entire Employment.

Except, perhaps, for galley slaves or the Flying Dutchman, no seaman has ever been cursed with a truly permanent assignment. As a consequence, some courts have qualified that requirement with the modifier "more

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> (3) the claimant must be aboard primarily to aid in navigation." *Id.*, 980 F.2d 567.

Even though this decision was handed down more than a year after this Court's decision in *Wilander*, we have to look to a footnote to discover that "The third part of the test was rejected in *McDermott Int'l*, 498 U.S. at ___, 111 S. Ct. at 817." *Id.*, at fn. 3. Old Jones Act interpretations clearly die hard.

[52] *Evans v. United Arab Shipping Co. S.A.G., supra*, 4 F.3d at 220-221.

[53] *Decision Below*, 20 F.3d at 52-53.

or less,"[54] while others have allowed seamen to satisfy it by proving that they performed "a substantial part" of their work aboard a vessel.[55] Still others have found "no insurmountable difficulty" in the fact that the seaman performs a substantial part of his or her work aboard a fleet of different vessels.[56] As originally handed down, these modifications were crafted to "ease" the permanent assignment requirement and thus expand the protective reach of the Jones Act.[57] They were obviously intended as a shield for injured workers.[58] As a famous passage from *Robison* put it, they made "[t]he reach of the Jones Act . . . a peril of the sea that could hardly have been dreamt of by the landlubbers in the oil business."[59] But in the last few years, Gulf Coast courts have turned the

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[54] *E.g., McKinley, supra,* 980 F.2d at 569.

[55] *E.g., Robison, supra,* 266 F.2d at 779.

[56] *Braniff v. Jackson Ave. Gretna Ferry, Inc.,* 280 F.2d 523, 528 (5th Cir. 1960); *see also Barrett, supra; Buna v. Pacific Far East Lines, Inc.,* 441 F. Supp. 84, 87-89 (N.D.Ca. 1978).

[57] *Stanfield v. Shellmaker, Inc., supra,* 869 F.2d at 525.

[58] *See, Chauvin v. Sanford Offshore Salvage, Inc.,* 868 F.2d 735 (5th Cir. 1989); *New v. Associated Painting Services, Inc.,* 863 F.2d 1205 (5th Cir. 1989); *Legros v. Panther Service Group, Inc.,* 863 F.2d 345 (5th Cir. 1989); *Lormand v. Superior Oil Co.,* 845 F.2d 536 (5th Cir. 1987); *Liverette v. N.L. Sperry Sun, Inc.,* 831 F.2d 554 (5th Cir. 1987); *Barrett v. Chevron, USA, Inc., supra; White v. Valley Line Co.,* 736 F.2d 304 (5th Cir. 1984); *Jones v. Mississippi River Grain Elevator Co.,* 703 F.2d 108 (5th Cir. 1983), *cert. den.,* 464 U.S. 856 (1983); *Bertrand v. International Mooring & Marine, Inc.,* 700 F.2d 240 (5th Cir. 1983); *Guidry v. Continental Oil Co.,* 640 F.2d 523 (5th Cir. 1981), *cert den.,* 454 U.S. 818 (1981); *Longmire v. Sea Drilling Corp., supra; Higginbotham v. Mobil Oil Corp.,* 545 F.2d 422 (5th Cir. 1977) *rev'd and rem'd* 436 U.S. 618 (1978).

[59] *Robison, supra,* 266 F.2d at 771.

permanent connection requirement into a nightmare for such old shellbacks as ship's pilots[60] and deep sea divers.[61] We respectfully submit that Congress never intended such bizarre and incongruous results.

As the decision below was quick to recognize, these incongruities grew out of the Fifth Circuit's view that "the language of the *Robison* test frames the substantial connection issue primarily, if not solely, in temporal terms."[62] This view lead that Circuit to the inevitable conclusion that a seaman's status must "be addressed with reference to the nature and location of his occupation taken as a whole."[63] That, of course, is the same conclusion which animates the arguments of petitioner and its *amici*. We respectfully submit that it is erroneous for several reasons.

2. The Seaman Status of Traditional Mariners Should be Determined Solely from Their Assignment at the Moment of the Injury.

The permanent connection requirement was not designed for traditional mariners, but for "ambiguous-amphibious maritime worker[s]" whose employments are

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[60] *See e. g., Bach, supra,* 920 F.2d at 333 [Brown, J., dissenting]; *Harwood, supra,* 944 F.2d. at 1194 [Ervin, J., dissenting].

[61] *Ashley, supra.*

[62] *Decision Below,* 20 F.3d at 54.

[63] *Longmire v. Sea Drilling Corp., supra,* 610 F.2d at 1347; *see also, Barrett v. Chevron USA, Inc., supra,* 781 F.2d at 1075; *Lormand v. Superior Oil Co., supra,* 845 F.2d at 540.

only incidentally related to a vessel.[64] The cases are populated, almost entirely, by oil rig welders,[65] tool pushers,[66] drilling foremen,[67] derrick operators,[68] riggers,[69] sandblasters,[70] mechanics,[71] and even granary workers.[72] But that requirement was not designed to illuminate the status of someone, like Antonio Latsis, who performs traditional seaman's work on one or more short voyages.[73] Nor should it be applied to ship's pilots or deep sea divers.

As Judge Brown dissented in *Bach*:

> "A compulsory pilot is in no sense comparable to those incidentally related to a vessel. Such pilot is indispensable. The vessel may not operate without him/her. That pilot is in supreme command of the basic function of the vessel – to navigate in maritime commerce. That person is a seaman or he/she is nothing."[74]

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[64] *Braniff v. Jackson Avenue Gretna Ferry, Inc., supra*, 280 F.2d at 525.

[65] *Barrett, supra; Lormand, supra.*

[66] *Guidry v. Continental Oil Co., supra.*

[67] *Higginbotham v. Mobil Oil Corp., supra.*

[68] *Liverette v. N.L. Sperry Sun, Inc., supra.*

[69] *Chauvin v. Sanford Offshore Salvage, Inc., supra.*

[70] *New v. Associated Painting Services, Inc., supra.*

[71] *Braniff, supra.*

[72] *Jones v. Mississippi River Grain Elevator Co., supra.*

[73] *Barrett v. Chevron USA, Inc., supra*, 781 F.2d at 1075, fn. 13.

[74] *Bach, supra*, 920 F.2d at 333 [Brown, J., dissenting]. To quote Chief Judge Ervin's dissent in *Harwood*:

> "In order to carry out his duties, the harbor pilot must board a ship he does not know and work with equipment he has not had a chance to examine. If the shipowner has the duty to provide a seaworthy vessel and equipment to the members of the crew, who have been excluded from the [Longshore] Act so that they may retain the benefit of that warranty as well as other general maritime remedies, surely the harbor pilot performing navigational duties aboard the ship with that same equipment is owed that same duty." *Harwood, supra*, 944 F.2d. at 1194 [Ervin, J., dissenting].

And as the Fifth Circuit, itself, admonished in *Wallace v. Oceaneering Int'l*:

> "We hold that a commercial diver, who embodies the traditional and inevitable task of navigation, has the legal protections of a seaman when a substantial part of his duties are performed on vessels. It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes [a diver] a seaman."[75]

What is more, even when applied to "ambiguous-amphibious maritime workers," like the "landlubbers" in

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[75] 727 F.2d. at 436. As Judge Fong recently put it in a decision from the district court of Hawaii: "The Fleet Seaman Doctrine was designed by the Fifth Circuit to broaden coverage under the Jones Act; its purpose is to extend 'seaman' status to those performing many land-based duties. Divers are inherently maritime workers – their primary functions are performed under the sea. They are not the intended beneficiaries of the Fleet Seaman Doctrine and to hold them to the overall-context-of-employment standard would defeat the doctrine's expansive purpose. Therefore, the court finds that the applicable time period for 'seaman' status is the time of the accident." *Kjar v. American Divers, Inc., supra*, 1994 A.M.C. at 529.

the offshore oil business, the substantial connection requirement has not one, but two distinct purposes. As the decision below explained, it was intended: First, to exclude those whose work brings them into contact with many vessels but who are not connected with any particular vessel or identifiable fleet of vessels; and, Second, to exclude those whose contribution, although limited to a single vessel or fleet of vessels, was nevertheless only temporary or transitory in nature.[76] As alert commentators were quick to realize, this double-barrelled approach scattered a good deal of confusion among the cases.[77] But if we rephrase the test in terms of the monolithic "sea-based/land-based" distinction that this Court emphasized in *Wilander*, as the Louisiana Supreme Court did in *Folse v. W. Atlas Int'l, Inc.*,[78] we see that the substantial connection requirement merely differentiates "between transitory land-based employees and those working aboard a vessel for a voyage."[79] To make the point again is to belabor it. The former must look to the LHWCA, no matter how much time they may spend afloat, while the latter are protected by the Jones Act, no matter how short their voyage may have been. This was the simple synthesis worked by the decision below.

Quoth the Second Circuit:

> "We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an

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[76] *Decision Below*, 20 F.3d. at 56.

[77] Robertson, "The Law of Seaman Status Clarified," *supra*, 23 J. of Mar.L. & Com. at 16-27.

[78] 593 So.2d 341 (La. 1992).

[79] *Id.*, 593 So.2d at 343.

> employment-related connection to a vessel in navigation. The test will be met where a jury finds (1) that the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration *or* (b) nature; (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea."[80]

As *Robison* did before it, this alternatively worded test "captures well an important requirement of seaman status."[81] It eschews the prolix and confusing "work platform doctrine," preserves the purely temporal criteria that are still necessary to identify "commuter" or "brown water seamen" like derrick barge hands,[82] tugboatmen,[83] ferry boat operators,[84] or dredge engineers,[85] and at the same time vouchsafes coverage to all those traditional "blue water" mariners, like ship's pilots[86] and deep sea divers,[87] whose individual voyages may be very short.

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[80] 20 F.3d at 57 [emphasis added].

[81] *Wilander, supra*, 111 S. Ct. at 817.

[82] *See e.g., Grimes v. Raymond Concrete Pile Co., supra* [piledriver held seaman]; *Soucie v. Trautwein Bros.* (1969) 275 C.A.2d 20 [piledriver held seaman].

[83] *Kernan v. American Dredging Co.*, 355 U.S. 426, 435, 78 S. Ct. 394, 399 (1958) [tugboat deckhand].

[84] *Braniff, supra* [ferry boat hand].

[85] *Senko, supra* [dredge engineer]; *Ramos v. Universal Dredging Corp.*, 547 F. Supp. 661 (D.C.Ha. 1982) [dredge engineer].

[86] *See* footnote 19, *supra*.

[87] *See* footnote 22, *supra*.

What is more, it makes the policy considerations outlined in *Wilander* quite explicit by working an on-going exposure to maritime hazards into the test. That test requires an employment-related allegiance to a rolling, pitching vessel,[88] and protects all those who *voyage* upon the waters. This brings us to our final point.

IV.

SEAMAN'S STATUS SHOULD NOT BE LIMITED TO THOSE WHO VOYAGE ON THE OPEN OCEAN.

While the Jones Act was plainly intended to protect offshore workers from the "perils of the sea,"[89] we should not interpret it to exclude the seamen who voyage on our Great Lakes, great and small rivers, scenic sounds, and salt water bays. Indeed, seamen can even be found on fresh water creeks.

Ninety-eight years ago, the Fourth Circuit sat down to the riddle of seaman standing in the aptly named *Saylor v. Taylor*.[90] The Jones Act would not be passed for another twenty-four years, but the court had to decide whether to grant a maritime wage lien to a crew of fresh water dredge hands. The resulting opinion is worth quoting at length:

> "And so it seems a stretch of the imagination to class the deck hands of a mud dredge in the

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[88] *Wilander, supra*, 498 U.S. at 346-347.

[89] *Wilander, supra*, 111 S. Ct. 807, 817 (1991); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 879-880 (1946); *Gizoni, supra*, 112 S. Ct. at 493.

[90] 77 F. 476 (4th Cir. 1896).

> quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world. Hence it is that in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station or profession.' "[91]

That ruling adumbrated *Robison* by more than 60 years. It foreshadowed *Wilander* by almost a century. But it still illuminates the Jones Act today. If that statute is to continue to adapt itself to all the new kinds of property and new sets of operatives and new conditions that are brought into existence in the progress of the world, we would do well to heed *Saylor's* holding in this case.

CONCLUSION

When the Jones Act was first adopted in 1920,[92] steam still competed with sail on most of the world's

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[91] *Id.*, 77 F. at 479.

[92] March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; amended June 5, 1920, c. 250, Sec. 23, 41 Stat. 1007.

trade routes, and the American merchant marine still flew its flag on all the world's oceans. Our seamen still navigated by the stars, steered by hand, and slept before the mast. Deep sea divers still braved the depths in heavy brass helmets, and still decompressed on open platforms in cold, black waters. In the last 74 years, merchant sail has disappeared. Diesel has supplanted steam. The American merchant marine has ebbed from the routes it used to dominate, and its few remaining mariners have learned to plot their course with computers, steer by auto-pilot, and live in air-conditioned crew's quarters among pools, spas, and video games.[93] But deep sea divers like those who belong to the UBCJA still brave the depths in the same brass helmets. They still decompress in the same cold waters on the same open platforms. Their job has changed very little. It still requires a degree of courage, strength, confidence, and endurance that is seldom called for ashore. In many ways, divers are the last real seamen. Certainly, no man is more exposed to the sea or to its perils, and none is more deserving of the protection we seek here. We respectfully urge this Court

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[93] A quarter-century ago, the American merchant marine still boasted 45,650 shipboard positions. U.S. Dept. of Transportation, Maritime Adm., *The Annual Report of the Maritime Administration for Fiscal Year 1986 ("MARAD Annual Report")*, Gov't Printing Off. (Wash.D.C. 1963), 19. By 1981, that number had dwindled to 46,245. *MARAD Annual Report* (1981 ed.) 44-45. According to the most recent figures, there are only 17,887 card-carrying merchant seamen left. *MARAD Annual Report* (1985 ed.) 37. The future of the Jones Act plainly lies elsewhere.

to vouchsafe that protection by affirming the decision below.

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